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Supreme Court, U.S.
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In The OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1998

CLEO JONES, *et al.*,
&
FRANCIS PATRICK NORWOOD, *et al.*,
&
JAY OTIS McKELLIPS, *et al.*,
&
JERRY PAUL TERRY, *et al.*,

Petitioners,

vs.

GEORGIA PACIFIC CORPORATION, *et al.*,

Respondents.

[Four Cases]

On Petition For Writ Of Certiorari Or, In The Alternative, Writ Of Mandamus And/Or Prohibition To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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QUESTIONS PRESENTED

1. Where a plaintiff's state court complaint states a valid claim against a forum state defendant, in deciding whether removal jurisdiction exists because of "fraudulent joinder," may evidentiary submissions be considered for any purpose other than determining whether the well-pleaded allegations made against the defendant in question are factually baseless and frivolous?

2. Before ruling on a motion to remand in the face of fraudulent joinder allegations, must a district court give notice to a plaintiff that the court intends to go beyond the state court complaint in making its decision, and thereby give the plaintiff a pre-ruling opportunity to present evidentiary materials?

3. Since a removing party bears the burden of proof to show "fraudulent joinder," is it error to require the plaintiff to come forward with proof on the merits of the cause of action against the allegedly fraudulently joined defendant, where the removing party's submissions would not suffice to require a dismissal of the "fraudulently joined" defendant under Rule 56, Federal Rules of Civil Procedure, or if dismissal under that Rule would otherwise be improper?

4. Where a district court found "fraudulent joinder" and exercised removal jurisdiction based on the consideration of matters outside the state court pleadings, but without having first given notice of such consideration to the plaintiff and thus a pre-ruling opportunity to submit evidentiary materials, was it error to refuse to remand on

QUESTIONS PRESENTED – Continued

reconsideration where the plaintiff promptly submitted evidentiary materials showing that the defendant whose joinder was questioned actually committed tortious acts under state law against the plaintiff?

PARTIES TO THE PROCEEDING

Petitioners

Hayward Lamar Andrews, Raphe Mennen Berry, Middleton Eugene Blackard, Henry Blackmon, Jr., Roy Lee Brown, Robert Alton Calhoun, Sims Coats, John Willard Fauver, Jerry Frank Dennis, Lonnie Marris Forbus, Warren Lewis Foster, Nebraska Greer, William Carr Hill, Jr., Barbara Ann Hoffman, Ray Hardin Hollingsworth, Clayton Lewis Hall, Henry James Jackson, Clarence Junior James, Cleo Jones, Albert Earl McGinnis, Jay Otis McKellips, Luther Mickels, James Edward Mosley, Patrick Francis Norwood, Braxton Kenneth Parker, Annie Kirksey Patton, Claude Morris Pike, Leslie C. Pitts, George Washington Ray, Alice Richardson, Ruben Edward Robinson, Sr., Chrysobel Robinson, Donald Ray Roper, Sr., Sylvester Ivey Sales, Robert Wayne Smelley, Leonard Ray Smith, Lindy Leon Stoker, Jerry Paul Terry, Donald Bellenger Vann, George Frederick West, Steve Williams, Jr., Cephas Love Wilson, Garland Edward Woods.

Nominal Respondent

The Honorable Robert L. Vining, Senior United States District Judge

Respondents

Allied-Signal, Inc. (successor to the Bendix Corporation), The Anchor Packing Company, A.P. Green Industries, Inc. (f/k/a A.P. Green Refractories Company, a Subsidiary of

PARTIES TO THE PROCEEDING – Continued

U.S. Gypsum Company), Aqua-Chem, Inc. (d/b/a Cleaver-Brooks Division), Armstrong World Industries, Inc., (successor to Armstrong Cork Company), Asbestos Claims Management Corporation, (c/o New National Gypsum Company, f/k/a National Gypsum Company), Asten, Inc., Borg-Warner Corporation, Certainteed Corporation, Chrysler Corporation, Combustion Engineering, Inc., Crown Cork and Seal Company, Inc. (successor to Mundet Cork Company), Dana Corporation, The Flintkote Company, Ford Motor Company, Foster Wheeler Energy Corporation, GAF Corporation (successor to Ruberoid Corporation), Garlock Inc., Gasket Holding, Inc. f/k/a Flexitallic Inc. (successor to Flexitallic Gasket Company), General Electric Company, General Motors Corporation, Georgia Pacific Corporation (successor to Bestwall Gypsum Company), Grefco, Inc., Harbison-Walker Refractories Company, Inc. (formerly a division of Indresco Inc.), Indresco Inc. (successor to Harbison-Walker Refractories Company, a division of Indresco, Inc.), Kelly-Moore Paint Company, Inc., The Maremont Corporation, Metropolitan Life Insurance Company, Minnesota Mining and Manufacturing Company (a/k/a "3M"), Moog Automotive Inc. (successor to Wagner Electric Corporation), North American Refractories Company, Owens-Corning f/k/a Owens-Corning Fiberglas Corporation (a/k/a Owens Corning Corporation), Pittsburgh Corning Corporation (successor to Unarco Industries, Inc.), Pneumo Abex Corporation (successor to Abex Corporation and American Brake Shoe

PARTIES TO THE PROCEEDING – Continued

Co.), Proko Industries, Inc., Quigley Company, Inc., Synkoloid, a Division of Muralo Co., Inc., Uniroyal Holding, Inc. (successor to U.S. Rubber Company), U.S. Gypsum Company, U.S. Mineral Products Company, USX Corp., W.R. Grace & Co.-Conn.

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OPINIONS BELOW

The opinion of the district court denying the plaintiffs' motion to remand is unpublished, and is appended as Appendix A. The opinion of the district court denying the plaintiffs' motion for reconsideration is unpublished, and is appended as Appendix B. The order of the court of appeals denying the plaintiffs' petition for writ of mandamus is unpublished, and is appended as Appendix C.

JURISDICTION

The court of appeals' order was entered on August 6, 1998. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1), or alternatively under 28 U.S.C. § 1651. In *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), this Court exercised certiorari jurisdiction over a mandamus order of a court of appeals. In other cases, this Court has exercised mandamus jurisdiction where, as here, a lower court was exercising jurisdiction expressly denied to it by statute. *E.g., Ex Parte Northern Pacific Ry.*, 280 U.S. 142 (1929).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Appended as Appendix D are 28 U.S.C. §§ 1332, 1441, 1446, 1447 & 1448.

STATEMENT OF THE CASE

The petitioners are plaintiffs in four asbestos personal injury tort actions filed in the Superior Court of Fulton County, Georgia. (*See* Appendix E, one of the four identical complaints at issue.) One of the defendants, General Motors Corporation (GMC), removed the actions to the United States District Court. Prior to removal, General Motors served interrogatories upon the plaintiffs inquiring about the plaintiffs' claims against Georgia Pacific Corporation, another defendant which is a Georgia citizen. The plaintiffs' initial discovery responses made objections, referred GMC to the plaintiffs' pleadings, and informed GMC that, given that the suits had just been filed, discovery would be employed to garner additional evidence. (*See* Appendix F-19-F-25, a representative sample of the discovery responses.) In its notices of removal which followed, General Motors claimed that based upon the plaintiffs' interrogatory answers, Georgia Pacific Corporation had been "fraudulently joined," and thus Georgia Pacific's Georgia citizenship should be disregarded. (*See* Appendix F-1-F-18, a representative sample of the removal notices.) Only if the district court were to disregard Georgia Pacific's joinder would removal jurisdiction exist.

The plaintiffs filed timely motions to remand. (Appendix G) The district court refused to remand the cases. In spite of the fact that the plaintiffs stated valid product liability and civil conspiracy claims against the local defendant, Georgia Pacific, and in spite of the fact that GMC did not prove that the allegations against Georgia Pacific were baseless or frivolous, the district court evidently wanted proof, from the plaintiffs, on the merits

of plaintiffs' claims against Georgia Pacific. With no such proof then before the district court (which is not surprising given that there is no requirement for such proof under this Court's precedents), the district court found "fraudulent joinder." The district court's opinion quoted from and relied upon the discovery material attached to GMC's notice of removal, although the district court never notified the plaintiffs that it would be relying upon materials beyond the state court complaints in making its remand decision, nor that it would (improperly) be placing the burden of proof upon them to show that Georgia Pacific was *not* "fraudulently joined."

After receiving the district court's opinion denying the motions to remand, an opinion which made it apparent that the court found "fraudulent joinder" because of a combination of a supposed pleading defect and a perceived failure of proof, rather than based on the correct test – that there was no possibility of ever stating a claim against Georgia Pacific under state law – the plaintiffs filed a motion for reconsideration. (Appendix H) The papers filed with the motions and briefs on reconsideration contained a large quantum of proof of plaintiffs' injuries from products manufactured by Georgia Pacific, and Georgia Pacific's membership in a group of asbestos manufacturers which for decades hid from workers and the public the dangers of asbestos. (*See id.*; Appendix I) Indeed, the proof submitted on reconsideration would have allowed the plaintiffs' case to survive a hypothetical summary judgment motion of Georgia Pacific. Interestingly, Georgia Pacific has itself not challenged its joinder, nor filed any dispositive motions.

In spite of the lack of notice to the plaintiffs in the first instance of the need for factual proofs, and regardless of the fact that the plaintiffs provided the district court with ample proof on reconsideration, the district court overruled the motion for reconsideration, as it overruled the remand motions, chastising the plaintiffs for not providing their proof earlier on.

The Eleventh Circuit Court of Appeals denied the plaintiffs' petition for writ of mandamus, without elaboration.

REASONS FOR GRANTING THE WRIT

The district court is exercising jurisdiction in a case where jurisdiction is lacking. Concomitantly, the district court is unlawfully depriving the courts of the State of Georgia of jurisdiction in these cases. In the process, the petitioners are not only being forced to litigate their claims in the federal system, but will be forced to litigate their cases in a very distant forum, as their cases have now been transferred to the Multidistrict Litigation of asbestos cases, pending in the Eastern District of Pennsylvania. Here, the district court found "fraudulent joinder" based on a methodology in conflict with this Court's precedents. The district court found that a combination of a simple (alleged) pleading defect, coupled with materials outside the pleadings, which were considered by the trial court without prior notice or an opportunity to put rebuttal materials before the court, established "fraudulent joinder." The district court so found even though the materials which were considered did not even come close

to the threshold requirement of proving that the allegations against the defendant in question were baseless or frivolous. As the Fifth Circuit Court of Appeals has aptly stated, the petitioners are now "trapped in a federal forum they did not choose on an explicitly non-removable claim." *In re Dutile*, 935 F.2d 61, 64 (5th Cir. 1991).

Beyond the interests of these petitioners, when it comes to determining the removal jurisdiction of federal courts in the face of "fraudulent joinder" accusations, lower court jurisprudence is a hodge-podge of inconsistent methods. Drawing on various opinions of this Court dating from the turn of the century, federal courts of appeals and district courts are in conflict over such basic issues as when, why and even whether pleadings may be pierced, and what the correct method is in general for determining fraudulent joinder, including what use can be made of materials submitted outside of the pleadings. *See* Note, *Reintroducing "Fraud" to the Doctrine of Fraudulent Joinder*, 78 VA. L. REV. 1377, 1389-97 (1992) [hereinafter *"Fraudulent Joinder"*]; *compare Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98 (5th Cir.), *cert. denied*, 498 U.S. 817 (1990), *with Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 112 (3d Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991). Because *how* fraudulent joinder determinations are made often ultimately determines whether a district court may exercise its limited jurisdiction, and whether a state court system is deprived of jurisdiction, uniform, fair and understandable procedures and rules for making "fraudulent joinder" determinations are necessary. Instead, courts of appeals are presently in conflict on these issues. In making "fraudulent joinder" determinations, federal district

courts often must simply pick and choose among conflicting circuit opinions within or among courts of appeals. Guidance from this Court is needed.

A. The Substantive Standard For Resolving Fraudulent Joinder Questions

The root of the "fraudulent joinder" exception is the language of Section 1441(b) of the Judicial Code and its precursors, bestowing removal jurisdiction if there is diversity of citizenship and if no defendant "properly joined" is a citizen of the forum state. It is now said that there are two different varieties of "fraudulent joinder." First, outright fraud in pleading jurisdictional facts. Second, "fraud" in naming a defendant against whom there is no legal basis for ever obtaining relief. *See generally* Note, *Reintroducing "Fraud" to the Doctrine of Fraudulent Joinder*, 78 VA. L. REV. 1377, 1378 (1992). This petition addresses the "second" type of alleged "fraudulent joinder," and the proper methodology for making a remand decision when this type of fraudulent joinder is alleged and sufficiently supported.

There is little debate about the substantive standards and burdens of proof for resolving fraudulent joinder questions. This Court's opinions make it clear that a case must be remanded in the face of fraudulent joinder allegations unless the removing party meets its burden of establishing that under applicable law, a cause of action can never be stated against the defendant in question. *E.g., Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152-53 (1914); *see Fraudulent Joinder*, at 1387-88.

While the "substantive" rules are clear enough, there is disarray in the lower courts about the manner in which those rules are to be applied to a given case. For lack of a better term, the lower courts are in conflict about the "methodology" to employ when applying the substantive rules of law in fraudulent joinder situations. This issue is, however, more than simply a question of procedure, as the choices made in how to apply the fraudulent joinder rules can often be outcome determinative. As seen below, the improper methodology employed in this case was outcome determinative.

B. The *Wecker* Case And "Piercing The Pleadings"

Early in this century, the Court began to explain the nature of the judge-made "fraudulent joinder" expansion to the Congressional grant of federal removal jurisdiction. This Court gave broad guidelines which are discussed below; however, for the last fifty years or so, the Court has been content to leave the matter to develop in the lower federal courts. Importantly, in the last ten years, lower courts have dramatically expanded this basis of removal jurisdiction, departing from this Court's apparent intentions, and going too far in expanding the scope of this common law exception to the limited nature of the jurisdiction granted by Congress in Sections 1332 and 1441 of the Judicial Code.

The general rule for determining fraudulent joinder is and has always been whether the pleadings of the plaintiff either presently state a cause of action, or could ever possibly state a cause of action under state law. As the rule implies, a review of the plaintiff's pleadings is

the *sine qua non* of the test. *E.g., Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 187 (1931); *Great Northern Ry. Co. v. Alexander*, 246 U.S. 276, 281-2 (1918); *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152-3 (1914); *Chicago, Rock Island & Pacific Ry. Co. v. Dowell*, 229 U.S. 102, 112-15 (1913); *Chicago, Rock Island & Pacific Ry. Co. v. Schwyhart*, 227 U.S. 184, 193-5 (1913); *Chicago, Burlington & Quincy Ry. Co. v. Willard*, 220 U.S. 413, 422, 427 (1911); *Illinois Central Railroad Co. v. Sheegog*, 215 U.S. 308, 315-6 (1909).

The question then is how, why and when should a district court go beyond the pleadings.

This Court has long permitted the piercing of pleadings in ascertaining whether there has been outright fraud in pleading jurisdictional facts. *E.g., Morris v. Gilmer*, 129 U.S. 315 (1889). Whether, how and in what situations piercing pleadings is permitted when deciding "fraudulent joinder" of the "second" variety, *i.e.*, when evaluating whether a plaintiff can ever have a valid cause of action against the defendant in question, is far less clear. In the decades since this Court's cluster of fraudulent joinder opinions between 1906 and 1931, lower courts have almost always stated the correct standard for deciding fraudulent joinder questions, but after that, the methodologies employed to make the decision have varied wildly. Current methods of decision-making are now so at odds with this Court's precedents, that the standard itself has been swallowed up in the process. Some courts require piercing pleadings, some allow it sometimes but not others, and some do not permit it. Some courts permit piercing to show outright fraud or frivolousness in factual allegations (the correct method), yet many others permit evidentiary submissions in order to undertake a

merits determination indistinguishable from a summary judgment, going so far as equating lack of success on the merits with "fraudulent joinder." *See Fraudulent Joinder*, at 1389-97; *compare Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98 (5th Cir.), *cert. denied*, 498 U.S. 817 (1990), *with Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 112 (3d Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991).

In the early case of *Alabama Great Southern Ry. Co. v. Thompson*, 200 U.S. 206 (1906), this Court reaffirmed the proposition that, in diversity cases, the plaintiff was the master of his own complaint. Absent "an attempt to commit a fraud upon the jurisdiction of the Federal courts," an action was not removable even where the joinder of a local citizen might prevent a plaintiff from recovering on the merits of the claim. *Id.* at 164-65. The Court did not elaborate on what would constitute a "fraud" upon the federal court's jurisdiction; however, it did make clear that a state court plaintiff could choose to assert a colorable cause of action against any defendant that the plaintiff desired, regardless of whether the plaintiff was likely to prevail against that particular defendant.

The following term, in *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176 (1907), the Court explained what it meant in *Alabama Great Southern* by "fraud on the jurisdiction of the Federal court." In *Wecker*, the Court faced a situation very similar to that presented the prior term. At issue was the joinder as defendants of the plaintiff's employer, and a fellow employee. The plaintiff in *Wecker*, who was injured in a construction accident, alleged that the local individual defendant was entrusted

by the employer co-defendant with oversight and supervision over the plaintiff, with the planning and construction of the furnace which injured the plaintiff, with providing suitable safety devices which would have prevented the plaintiff's fall, with providing safe construction devices, and with instructing the plaintiff on how to carry out his work. However, in support of the employer's removal petition, the local defendant filed an affidavit which established that the factual allegations against him in the complaint were frivolous, and that he was never given any of the responsibilities attributed to him by the plaintiff. The plaintiff did not dispute the affidavit; indeed the plaintiff conceded much of it. Thus, the critical difference between *Alabama Great Southern* and *Wecker* was the affidavit by the local citizen-defendant, which established a "want of basis for the allegations of the petition" against the local defendant. *Id.* at 185. Given that the allegations against the local defendant were "baseless," the Court found that the questioned joinder was indeed "fraudulent," and removal was proper.

The meaning of the *Wecker* decision is important to present-day fraudulent joinder jurisprudence, as it introduced "piercing the pleadings" as a permissible method for resolving fraudulent joinder questions of the "second" variety. *Wecker* and other similar cases are cited as exceptions to the usual rule that the pleadings are determinative of fraudulent joinder. In the decades since *Wecker* was decided, the *Wecker* line of authority has also "evolved," indeed in the petitioners' view, *Wecker* has mutated in the lower courts. Based on *Wecker* and its progeny, lower federal courts now permit the routine piercing of pleadings and the taking of evidence on the

merits of claims for the purpose of pre-trying cases in the guise of determining jurisdiction. This is done by equating a plaintiff's putative lack of success on the merits in a quasi-summary judgment setting, with "fraudulent joinder" – rather than examining the pleadings and additional submissions to assess whether the factual allegations made against the local defendant are themselves *frivolous or baseless*, the situation in *Wecker* and the other foundational cases. The lower courts' current distortion of *Wecker* and its progeny calls for correction.

What began with *Wecker* – permitting piercing of pleadings to determine whether allegations against the local defendant were baseless or frivolous, in addition to the traditional allowance of piercing to determine whether jurisdictional allegations were false – proceeded apace in later cases. Significantly, however, an examination of these subsequent cases from this Court reveals that the piercing of pleadings permitted was not in aid of an inquiry into the merits of the claims, such that a hypothetical dismissal on the merits would equal a "fraudulent joinder," but instead simply for determining whether the facts pled are baseless or frivolous. In other words, a proper understanding of this Court's precedents reveals that in addition to testing the state court pleadings for the plaintiff's ability to ever state a claim, extraneous evidence can be taken in determining the "second" type of fraudulent joinder, but, like the "first" type, its use is limited to establishing that the facts pled regarding the local defendant's involvement in the underlying events in question are frivolous.

The lower courts have, however, not been so chary in their reading of this Court's precedents, and the result

has been a disregard of this Court's precedents in this area, and a failure to heed this Court's consistent pronouncements that given Our Federalism, all doubts should be resolved against federal jurisdiction. *E.g., Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 108-9 (1941). Somewhere along the line, the lower courts' use of evidentiary submissions was transmuted from a means to determine "if the facts asserted with respect to the resident defendant are . . . so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of plaintiff" that there could be liability,[1] to a collapsed determination of fraudulent joinder and summary judgment on the merits. *See, e.g., Carriere*, 893 F.2d at 100-103. Significantly, a review of this Court's precedents reveals that the fraudulent joinder methodology employed by the court below (and many other lower federal courts), which looks outside the pleadings to prejudge the merits of the plaintiff's claims, is improper.

In *Illinois Central Railroad Co. v. Sheegog*, 215 U.S. 308 (1909), Justice Holmes effectively capsulized the proper scope of the fraudulent joinder inquiry:

> If *the legal effect of the declaration* in this case is that the Illinois Central Railroad Company was guilty of certain acts and omissions by reason of which a joint liability was imposed upon it and its lessor, the joinder could not be fraudulent in a legal sense on any ground except that *the charge* against the alleged immediate wrongdoer, the Illinois Central Railroad itself, *was fraudulent and false.*

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[1] *Parks v. New York Times Co.*, 308 F.2d 474, 477 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964).

Id. at 316 (emphasis added). Thus, consistent with *Wecker*, this Court concisely held that the legal effect of the state court pleading, *i.e.*, that a valid claim was stated, controls the outcome of the fraudulent joinder analysis, unless the facts pled ("the charge") against the local defendant were "fraudulent and false." Significantly, the Court made it absolutely clear that there is a complete dissociation between whether the joinder is "fraudulent" versus whether the claims lack merit: "It may be mentioned here that the jury found for the other two [allegedly fraudulently joined] defendants and against the Illinois Central Railroad Company, but that fact has *no bearing* upon the case." *Id.* (emphasis added)

This Court revisited the issue of extraneous evidence in fraudulent joinder determinations in *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146 (1914). In *Cockrell*, the plaintiff's decedent was killed in a railroad accident, and suit was brought in state court against the employer and the local residents/employees who were operating the locomotive which struck the deceased. The railroad petitioned for removal, which was denied. The railroad maintained that the joinder of the local defendants, who operated the train, was a "fraudulent device to prevent a removal." The Court, following well-established fraudulent joinder rules, held that because the state court complaint "stated a good cause of action against the resident defendants," "the case was not removable, the joinder of the resident defendants being apparently the exercise of a lawful right." *Id.* at 152-3. Importantly, consistent with *Wecker* and *Sheegog*, the Court went on to hold that the ultimate ability of the plaintiff to succeed on the merits was immaterial to the fraudulent joinder analysis:

> The railway company's petition for removal, while not denying that the engineer and fireman were in the employ of the company, or that they were operating the train when it struck and injured the intestate, did allege that the charges of negligence (all being specifically repeated) against the defendants were each and all "false and untrue, and were known to by the plaintiff, or could have been known by the exercise of ordinary diligence, to be false and untrue, and were made for the sole and fraudulent purpose of affording a basis, if possible, for the fraudulent joinder" of the engineer and fireman with the railway company.
>
> . . . .
>
> With the allegation that [the local defendants] were operating the train which did the injury standing unchallenged, the showing amounted to nothing more than a traverse of the charges of negligence, with an added statement that they were falsely or recklessly made and could not be proved as to the engineer or fireman. . . . Plainly, this was not such a showing as to engender or compel the conclusion that the two employees were wrongfully brought into *a controversy which did not concern them.*

Id. (emphasis added)

Thus, in *Cockrell,* this Court once again eschewed examinations of matters beyond the state court complaint for the purpose of evaluating the merits of the claims, and obviously dissociated success on the merits from the different issue of whether parties who were strangers to a controversy were joined based upon frivolous factual averments.

In *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), the Court wrote again on fraudulent joinder and how it could be established. In *Wilson*, an injured employee filed suit against his employer and a local resident co-employee in state court. The employer petitioned for removal, and in the sworn petition, the testimony of the employer included the following:

> the plaintiff personally and intimately knew every person who could by any possible chance have caused his injuries, and knew the coemploye [sic] was not in any degree whatsoever responsible therefor; and that, as the plaintiff well knew all along, the coemploye was not guilty of any joint negligence with the employer, was not present when the plaintiff's injuries were received, and did no act or deed which caused or contributed to such injuries.

Id. at 94. In response, the plaintiff moved to remand, "but the plaintiff did not by the motion or in any wise traverse or take issue with any of the allegations of the petition for removal." *Id.* at 95. Citing *Wecker*, the Court held that, as the plaintiff admitted that the local defendant had "no real connection with the controversy," the joinder was considered "fraudulent" and removal was proper.

Finally, although *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931) decided a different issue (probate appointments made for the purpose of defeating diversity jurisdiction), it is significant that the Court specifically characterized *Wecker* and *Wilson* as cases involving "*actual fraud* such as was sufficient to justify removal." *Id.* at 189 (emphasis added).

In sum, this Court permits piercing the pleadings for the limited purposes of determining whether there is outright fraud in the jurisdictional allegations, or determining whether there is outright fraud in the factual allegations against the local defendant, *i.e.*, frivolous or baseless allegations made against someone who is a stranger to the controversy, joined simply to have a local defendant named in the state court complaint. This Court has also consistently made clear that even where the claims against the local defendant are "meritless," that is immaterial to the question of whether the allegations made are "baseless" in the sense this Court used that term. The lower courts have, however, taken this Court's precedents and transmuted their analysis into an assessment of the merits of the plaintiff's claims, and have equated a prediction of lack of success on the merits with fraudulent joinder. This Court should return from its half-century hiatus in this area, and put the fraudulent joinder analysis back on course.

C. The Correct Approach

When a motion to remand is filed in response to a removal based upon allegations of "fraudulent joinder," the district court must undertake one or both of the following analyses, depending upon the contents of the notice of removal. This methodology is simply a synthesis of this Court's fraudulent joinder opinions discussed above, harmonized with analogous procedural mechanisms found in the modern Federal Rules of Civil Procedure.

First, if the notice of removal alleges that the plaintiff can never plead facts which constitute a cause of action under state law, the district court must examine the state court pleading and determine (a) whether the pleading states a claim under state law or (b) could possibly state a claim under state law based upon a good faith interpretation of existing state law or a good faith argument for the extension of state law, or (c) could, if amended to add additional allegations, state such a claim. If a claim could possibly be stated, a motion to remand must be granted.

Second, if the notice of removal avers that the factual allegations against the local defendant are fraudulent, *i.e.*, are frivolous or baseless because the local defendant is a stranger to the underlying transactions or occurrences, and if the removal notice is supported by evidentiary materials which, if unrebutted, would justify such a finding, then, after giving the plaintiff notice and an opportunity to present rebuttal materials,[2] a motion to remand must be granted if the plaintiff places materials before the

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[2] Given that the traditional rule has always been that the propriety of joinder is tested by the allegations of the state court complaint, simple fairness requires that the district court notify a plaintiff that materials outside of the state court complaint will actually be considered by the court in determining fraudulent joinder. Moreover, such notice makes this procedure consistent with the Federal Rules of Civil Procedure, which require notification and an opportunity to submit evidence when the court elects to move from an analysis based on the face of the complaint, to one based upon evidentiary or other documentary submissions. *See* Rule 12(b), Federal Rules of Civil Procedure; *Carter v. Stanton*, 405 U.S. 669, 671 (1972); *Jones v. Automobile Ins. Co. of Hartford, Connecticut*, 917 F.2d 1528, 1531-33 (11th Cir. 1990).

court showing that the forum state defendant was involved in the underlying transactions or occurrences upon which suit is based. Also, if such evidence cannot then be provided, and the plaintiff comes forward with a valid explanation of why such evidence is not yet in the plaintiff's possession,[3] a motion to remand must be granted.

As seen in the next section, the district court failed to use the correct methodology, and in so doing abused its discretion.

D. The District Court Employed An Impermissible Methodology, And, Regardless, The District Court Erred By Not Notifying The Plaintiffs That It Would Be Considering Materials Outside The Complaints

The district court did not use the proper methodology in deciding the motions to remand. Consequently, the district court clearly erred and abused its discretion.

First, the district court failed to test the state court pleadings correctly. The district court ignored the fact that the plaintiff stated or could have stated valid claims for product liability and civil conspiracy against the local defendant, Georgia Pacific. *See, e.g., Farmer v. Brannan Auto Parts, Inc.*, 231 Ga. App. 353, 498 S.E.2d 583 (1998)

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[3] Again, this makes the fraudulent joinder methodology procedurally consistent with the Federal Rules of Civil Procedure. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (summary disposition of cases should not be employed "if the nonmoving party has not had an opportunity to make full discovery.").

(product liability cause of action under Georgia law); *Blackstone Industries, Inc. v. Andre*, 232 Ga. 715, 208 S.E.2d 815 (1974) (civil conspiracy cause of action under Georgia law). Instead, the district court fastened on its perception that the allegations against "Georgia Pacific" were not sufficiently specific because they were not stated against it *eo nomine*, but were stated more generically against all "defendants," which, by definition included Georgia Pacific. Yet, even if this were a pleading "defect," which it is not, it would not be a valid basis for finding that Georgia Pacific was "fraudulently joined." *Chicago, Rock Island & Pacific Ry. Co. v. Schwyhart*, 227 U.S. 184, 194 (1913) (in deciding whether a joinder was fraudulent, "[w]e are not to decide whether a flaw could be picked in the declaration on special demurrer.").[4]

Second, the district court improperly considered evidentiary materials submitted by the removing defendant, because the court did not give the plaintiffs prior notice that it would consider those materials. Consequently, the plaintiffs were denied the opportunity to place rebuttal evidence before the court illustrating Georgia Pacific's involvement in the plaintiffs' injuries.

Third, the district court erroneously concluded that the pleadings, coupled with the material submitted by the removing defendant GMC, were sufficient to establish

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[4] The "special demurrer" has its current analogue in Rule 12(e), Federal Rules of Civil Procedure, which rule allows the court to require a "more definite statement" of the claim. *See* H.C. Black, *Black's Law Dictionary* at p. 390 (5th ed. 1979). Thus, a lack of specificity in pleading has been specifically rejected by this Court as a basis for finding fraudulent joinder.

"fraudulent joinder." GMC submitted interrogatory answers of the plaintiffs concerning their injuries by Georgia Pacific. The interrogatory answers referred GMC to the state court complaints, which set forth several different ways in which they were injured by all defendants, including Georgia Pacific. The interrogatory answers also objected to the interrogatories as premature given that they were served only a couple of months after the filing of the suit, and informed GMC that the plaintiffs would supplement their answers after undertaking further discovery of their own. It is plain that the interrogatory answers do not even approach the quantum of proof necessary to make a *prima facie* showing that Georgia Pacific could not possibly have been involved in the various transactions and occurrences through which the plaintiffs were injured. Thus, the submissions by GMC were insufficient to even require an evidentiary rebuttal by the plaintiffs. Moreover, denying remand based upon GMC's inadequate showing highlights the district court's compounding of error by placing the burden of proof on the plaintiffs, rather than on GMC, the party seeking to invoke the court's removal jurisdiction.

In sum, the district court's methodology in addressing the fraudulent joinder issue was erroneous. It applied an incorrect test to the pleadings themselves, and assumed jurisdiction based on a perceived lack of specificity in pleading. It pierced the pleadings by permitting and considering evidentiary submissions, but did so without prior notice to the plaintiffs of such consideration. It found that the evidentiary submissions were

sufficient to show fraudulent joinder, when those materials fell far short. Finally, it improperly shifted the burden of proof to the plaintiffs to establish "non-fraudulent joinder." Because of these abuses of discretion, the writs must be granted, and the courts below must be reversed.

E. The District Court Erred When It Refused To Consider The Proof Provided By The Plaintiffs On Reconsideration, As The Motion To Remand Was Decided Without First Giving Plaintiffs An Opportunity To Submit Their Evidentiary Material

After the district court refused to remand because of its perception that the pleadings and interrogatory answers of the plaintiffs failed to prove that Georgia Pacific was not a fraudulently joined defendant, the plaintiffs moved to reconsider. The motion for reconsideration was filed because, until the district court's opinion was received, and based on applicable law, the plaintiffs were not "aware" that they were under any compulsion to provide proof on the merits of their underlying causes of action against Georgia Pacific, or of any necessity to replead more specifically on pain of denial of the motions to remand. Obviously, the plaintiffs were unaware of these requirements because they were not and are not requirements. However, since the district court wanted proof, proof it would receive.

The plaintiffs' motion for reconsideration was accompanied by evidentiary submissions of how the plaintiffs were injured by products of Georgia Pacific. These materials would be sufficient to meet the plaintiffs' burden as

a non-movant under Rule 56, Federal Rules of Civil Procedure; therefore, favorable reconsideration was assured. Yet, the district court denied the motion for reconsideration, refusing even to consider the evidence submitted, holding in its opinion on reconsideration that the evidence came "too late."

On nearly identical facts, in *Ford v. Elsbury*, 32 F.3d 931 (5th Cir. 1994), the Fifth Circuit Court of Appeals correctly held that it was an abuse of discretion to disregard such evidence, as the district court did in this case. In *Ford*, the district court ruled that a defendant had been fraudulently joined and denied the plaintiffs' motion to remand. The plaintiffs then filed a motion to reconsider, attaching evidence showing that the defendant had not been fraudulently joined. The district court refused to consider the evidence and denied the motion. While acknowledging that a district court must be allowed to "enforce some limits on the timely submission of appropriate evidence," the Fifth Circuit reversed, holding that the district court had "abused its discretion in refusing to consider the additional evidence proffered with plaintiffs' motion to reurge." 32 F.3d at 936. The court reviewed in detail the factors favoring consideration of the evidence, which are equally relevant to this case:

> [T]he circumstances here, as best we can glean from the record, cause us to question the extent to which plaintiffs were on notice that they were required to make an evidentiary showing in connection with the motion to remand. . . . The filing of a motion for summary judgment would have put plaintiffs on notice that they could not rely at all on their pleadings and were required

> to submit competent summary judgment evidence. Here, where no summary judgment motion was ever filed, the extent to which plaintiffs could rely on their pleadings was less clear. . . . We further note that in this case discovery was at an early stage and was beset by the usual share of discovery delays and squabbles. . . . Considering all the circumstances, we believe that the district court should have allowed the proffer of additional evidence.

Id. at 938. Here, the situation is nearly identical. In their initial motion to remand, petitioners relied almost entirely on their pleadings, and primarily on the fact that they stated valid causes of action against Georgia Pacific. After the order denying remand, wherein the district court held that petitioners were required to prove the validity of their claims, the petitioners submitted evidence which clearly demonstrated the factual viability of their claims against Georgia Pacific, and that, therefore, it had not been fraudulently joined. Still, reconsideration was denied.

The district court placed the petitioners in a classic Catch-22. The court required factual proof of "non-fraudulent joinder," without notice that the burden was shifted, and without notice that such proof would be either considered or required. Predictably, there being no such proof then before the court, the motions to remand were denied. Then, as soon as they received "notice" that such proof was required, and the plaintiffs supplied it, the district court found that the proof came too late.

The district court clearly erred and abused its discretion in refusing to remand on reconsideration, and the

court of appeals similarly erred by not correcting the district court, and this Court should grant the writ and reverse.

CONCLUSION

Whatever the source of the differing methodologies for resolving fraudulent joinder controversies, whether it be unclear language in this Court's opinions or simply lower courts' misapprehension of the import of this Court's language, it is a situation which needs to be remedied. Presently, the circuits are split on if, how and when to pierce pleadings when determining fraudulent joinders, and how such materials may be used. This disarray is another factor which makes it clear that this issue deserves this Court's attention.

The district court and the court of appeals abused their discretion in failing to order these cases remanded to the Georgia state courts, thus not only consigning the plaintiffs to litigate their state law cases in the federal system, but in the distant forum of the MDL court in Pennsylvania. The petitioners in this Court have no adequate remedy for this federal usurpation of state court jurisdiction other than immediate reversal by this Court.

This Court should grant the petition for writ of certiorari, or alternatively for writ of mandamus or prohibition.

Respectfully submitted,

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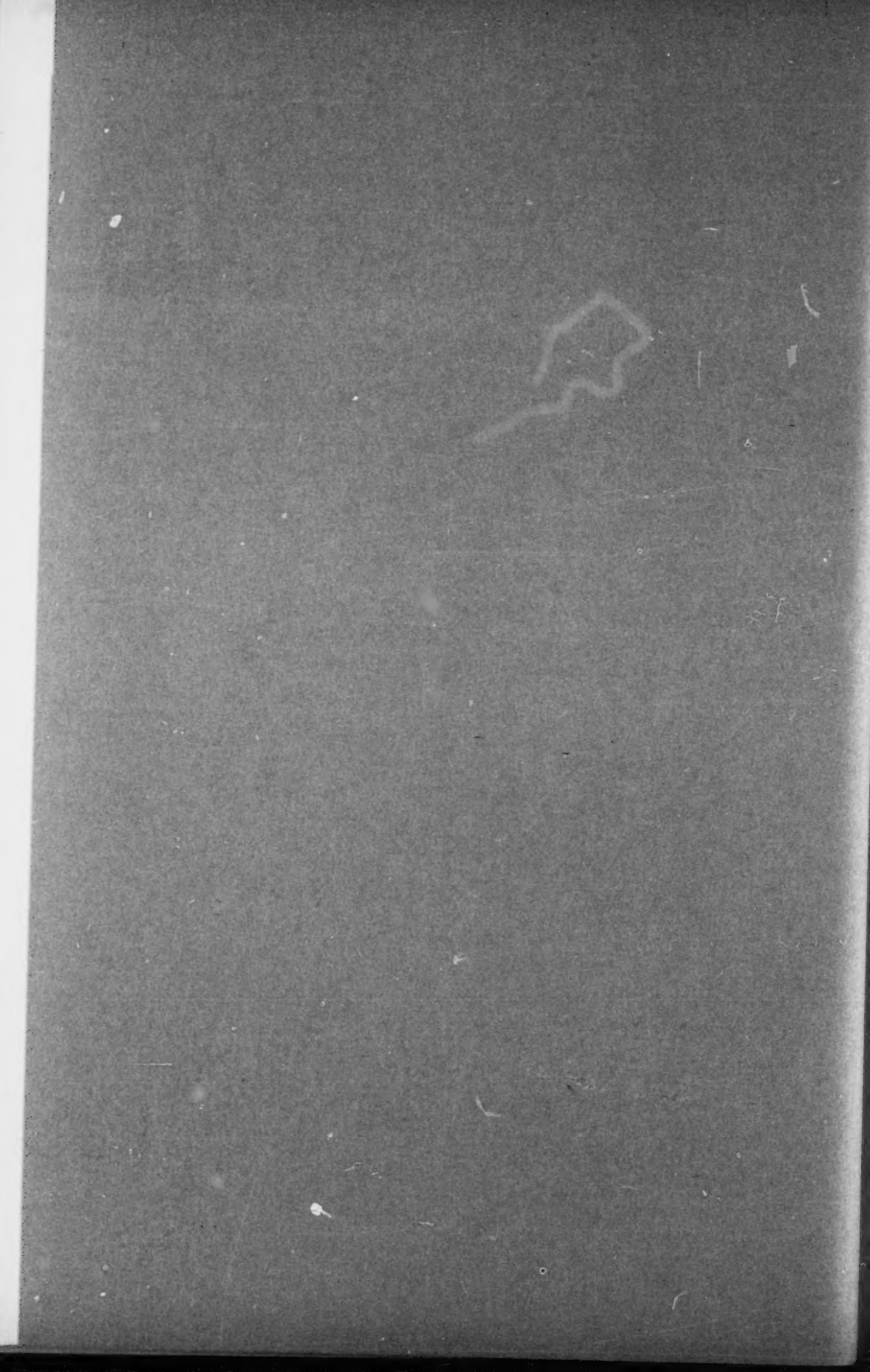
APPENDIX TO PETITION FOR WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE FOR WRIT OF MANDAMUS AND/OR PROHIBITION



APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CLEO JONES, Individually and as Personal Representative of the Heirs and Estate of Isaiah Jones, Jr., et al., Plaintiffs, v. GEORGIA PACIFIC CORPORATION, et al., Defendants.	)	CIVIL ACTION No.
FRANCIS PATRICK NORWOOD, et al., Plaintiffs, v. GEORGIA PACIFIC CORPORATION, et al., Defendants.	)	CIVIL ACTION NO. 1:98-CV-746-RLV
JAY OTIS MCKELLIPS, et al., Plaintiffs, v. GEORGIA PACIFIC CORPORATION, et al., Defendants.	)	CIVIL ACTION NO. 1:98-CV-747-RLV

JERRY PAUL TERRY, Individually and as Personal Representative of the Heirs and Estate of Carolyn Elaine Terry, et al., Plaintiffs, v. GEORGIA PACIFIC CORPORATION, et al., Defendants.	CIVIL ACTION NO. 1:98-CV-748-RLV (Filed Apr. 24, 1998)

ORDER

These cases, alleging injury as a result of exposure to the defendants' asbestos products, were originally filed in the Superior Court of Fulton County, Georgia, and were removed to this court by notice filed on March 9, 1998. Pending before the court are General Motors Corporation's motions to stay and the plaintiffs' motions to remand.

General Motors Corporation [hereinafter "GMC"] removed this action based upon diversity of citizenship. It is uncontested that the plaintiffs are citizens of Alabama and that all defendants are citizens of states other than Alabama; thus, complete diversity exists. However, a diversity case is removable "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). Since one of the defendants, Georgia-Pacific Corporation is a citizen of Georgia, the plaintiffs

contend that the actions were improperly removed. GMC, on the other hand, contends that Georgia-Pacific was fraudulently joined and that, as a consequence, removal was proper.

In a removal case where the removing party alleges fraudulent joinder, that party has the burden of proving either:

> (1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court.

Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997). In considering a motion to remand, a district court is not to weigh the merits of a plaintiff's claim beyond determining whether it is an arguable one under state law.

> "If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court."
>
> *Crowe*, 113 F.3d at 1538, *quoting* Coker v. Amoco Oil Co., 709 F.2d 1433, 1440-41 (11th Cir. 1983).

The complaints in these cases suffer from the kind of pleading criticized by the court in Cesnik v. Edgewood Baptist Church, 88 F.3d 902 (11th Cir. 1996). The plaintiffs are never identified by name within the complaints but are shown on Exhibit A to each complaint; within the complaints they are simply referred to as "Plaintiffs." The

same is true, with limited exceptions,[1] with respect to the defendants. Thus, from the complaints it would appear that the plaintiffs are alleging that each and everyone [sic] of them was exposed to the products of each and every defendant.[2] It is because of such a shotgun approach that a court may look to matters outside the bare pleadings to determine if joinder was fraudulent. *See Crowe*, 113 F.3d at 1538 ("[T]he court may consider affidavits and deposition transcripts submitted by the parties.")

To determine precisely what claims were being asserted against Georgia-Pacific, GNC served interrogatories on plaintiffs Claude Morris Pike (Civil Action No. 1:98-cv-745-RLV), John Willard Fauver (Civil Action No. 1:98-cv-746-RLV), Chephas Love Wilson (Civil Action No. 1:98-cv-747-RLV), and Albert Earl McGinnis (Civil Action

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[1] E.g., in Counts One and Two, Minnesota Mining and Manufacturing Company is specifically mentioned as having provided respiratory devices; in Counts Three and Five, Metropolitan Life is identified as being a conspirator and as having undertaken duties owed by the other defendants when it conducted testing of an asbestos workers; in Count Three, Owens Corning is identified as continuing to engage in a pattern of fraudulent conduct "against asbestos Plaintiffs, including these plaintiffs, as well as various courts and juries."

[2] Additionally, under each count, the complaints incorporate by reference all preceding paragraphs, not just the factual allegations; thus, Count Six actually includes Counts One, Two, Three, Four, and Five. This careless draftsmanship further adds to the confusion engendered by the complaints as written.

No. 1:98[-]cv-748-RLV).[3] The interrogatories and responses are as follows:

> INTERROGATORY NO. 1 – State whether plaintiff [Pike, Fauver, Wilson, McGinnis] alleges any claim or cause of action in this case against defendant Georgia-Pacific Corporation.
>
> ANSWER – Plaintiff objects to this interrogatory as it is unduly burdensome, harassing and repetitive since it seeks information which has already been provided in the original complaint. Consequently, Defendant's discovery seeks to engender unnecessary and added costs to this litigation by asking plaintiff to produce information previously provided. Without waiving these objections, please see the original complaint and any supplements and/or amendments thereto. All the named plaintiffs in this suit are bringing claims against Georgia Pacific Corporation. Investigation into this case is still continuing. Last, please see Plaintiff's deposition testimony given or to be given in this case as well as all of Plaintiff's discovery and supplemental discovery responses filed or to be filed in this case.
>
> INTERROGATORY NO. 2 – If the answer to Interrogatory Number 1 is yes,

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[3] Each complaint, when naming GMC as a defendant, has the following language (with only the plaintiff's name being different): "Only Plaintiff CLAUDE MORRIS PIKE [or Fauver, Wilson, or McGinnis] is bringing claims herein against Defendant GENERAL MOTORS CORPORATION." However, as noted earlier, this distinction is ignored throughout the rest of the complaint as the plaintiffs refer generally to "Plaintiffs" and "Defendants" in asserting their claims. Thus the court is left to wonder which paragraphs of the complaint control.

a. identify the exact claim(s) or cause(s) of action alleged; and

b. state in detail all facts which allegedly support each claim by Mr. [Pike, Fauver, Pike, McGinnis] against Georgia-Pacific Corporation, including identifying which specificity and dates any products to which plaintiff was exposed to which Georgia-Pacific is allegedly responsible, and all statements or omissions of Georgia-Pacific (including precise time, place and content) claimed to have harmed Plaintiff [Pike, Fauver, Pike, McGinnis].

ANSWER – Plaintiff objects to this interrogatory as it is unduly burdensome, harassing and repetitive since it seeks information which has already been provided in the original complaint. Consequently, Defendant's discovery seeks to engender unnecessary and added costs to this litigation by asking plaintiff to produce information previously provided. Further, this interrogatory is premature because Plaintiff has not had an ample opportunity to pursue discovery in this case. Without waiving these objections, please see the original complaint and any supplements and/or amendments thereto. All the named plaintiffs in this suit are bringing claims against Georgia-Pacific Corporation. Investigation into this case is still continuing. Last, please see Plaintiff's deposition testimony given or to be given in this case as well as all of Plaintiff's discovery and supplemental discovery responses filed or to be filed in this case.

Once GMC received these responses, it concluded that the plaintiffs had no claim against Georgia-Pacific and

obtained the consents of the other defendants to remove the action to federal court.

The plaintiffs, referring to the "no possibility" language of *Crowe v. Coleman*, contend that even though there is a "difficulty of providing specific product exposure and work history information for workers who were exposed over decades (often ending years ago) to hundreds, or perhaps even thousands, of products." Plaintiffs' Reply in Support of Emergency Motion for Remand at 2.

> Their inability to provide product information this early stage in the litigation does not conceivably provide a basis for a finding that plaintiffs have "no possibility" of developing this information within a reasonable time through discovery.
>
> *Id.*

The plaintiffs' reliance on the "no possibility" is misplaced. There is always the "possibility" that a person has a claim against another person. However, *Crowe* is not so expansive. When read in context, *Crowe* clearly does not stand for such an expansive proposition. Instead, the court in *Crowe* focused on the factual allegations in the plaintiff's complaint to determine of those specific facts would support a state law claim against the resident defendant. In the instant case, the plaintiffs have come forward with no specific factual allegations against Georgia-Pacific whatsoever. Merely alleging that the defendants manufactured or distributed products which injured the plaintiffs is far different from alleging that the defendant's action in allowing gasoline to escape from his

particular property stated a claim for nuisance under Georgia law.

The plaintiffs contend that their conspiracy allegations against Georgia-Pacific are sufficient to state a claim. However, conspiracy itself is not a tort under Georgia law.

> Where it is sought to impose civil liability for a conspiracy, the conspiracy of itself furnishes no cause of action. The gist of the action, if cause of action exists, is not the conspiracy alleged, but the hurt committed against the plaintiff and the resulting damage.
>
> Savannah College of Art & Design, Inc. v. School of Visual Arts of Savannah, Inc., 219 Ga. App. 296, 297 (1995), *quoting* Cook v. Robinson, 216 Ga. 328, 328-29 (1960).

The plaintiffs' general allegations of conspiracy do nothing to correct the deficiencies in their allegations regarding the underlying torts. As discussed above, they have presented no facts whatsoever to show that they have a cause of action against Georgia-Pacific.

For the foregoing reasons, the plaintiffs' Emergency Motions for Remand are DENIED; GMC's Motions to Stay until such time as the Panel on Mutltidistrict [sic] Litigations determines whether this action is a tagalong with the other asbestos cases pending in the United States District Court for the Eastern District of Pennsylvania is GRANTED.

SO ORDERED, this 23rd day of April, 1998.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CLEO JONES, Individually and as Personal Representative of the Heirs and Estate of Isaiah Jones, Jr., et al., Plaintiffs, v. GEORGIA PACIFIC CORPORATION, et al., Defendants.	CIVIL ACTION No. 1:98-CV-745-RLV
FRANCIS PATRICK NORWOOD, et al., Plaintiffs, v. GEORGIA PACIFIC CORPORATION, et al., Defendants.	CIVIL ACTION NO. 1:98-CV-746-RLV
JAY OTIS MCKELLIPS, et al., Plaintiffs, v. GEORGIA PACIFIC CORPORATION, et al., Defendants.	CIVIL ACTION NO. 1:98-CV-747-RLV

JERRY PAUL TERRY, Individually and as Personal Representative of the Heirs and Estate of Carolyn Elaine Terry, et al., Plaintiffs, v. GEORGIA PACIFIC CORPORATION, et al., Defendants.	)	CIVIL ACTION NO. 1:98-CV-748-RLV (Filed Jul. 15, 1998)

ORDER

These cases, alleging injury as a result of exposure to the defendants' asbestos products, were originally filed in the Superior Court of Fulton County, Georgia, and were removed to this court by notice filed on March 9, 1998. By order dated April 23, 1998, this court denied the plaintiffs' emergency motions to remand. Pending before the court are the plaintiffs' motions for reconsideration or, in the alternative, for certification pursuant to 28 U.S.C. § 1291(b).[1]

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[1] The plaintiffs have also filed a petition for writ of mandamus in the Court of Appeals for the Eleventh Circuit, asking that court to review this court's refusal to remand the cases. One of the bases for filing that petition is that this court's delay in ruling on the motions for reconsideration could render the issue moot if the Panel on Multidistrict Litigation decides to transfer the cases in the meantime. This court notes that one of the reasons for delay is that the plaintiffs filed their motions for reconsideration in state court, not this court. Only after General Motors, Inc., filed its brief in this court in opposition to the motion was the court made aware of the motions for reconsideration. After being contacted by this court, the plaintiffs then filed their motions in this court.

This court has carefully reviewed the motions for reconsideration and finds no legal basis for receding form its prior order. The plaintiffs' attempt to introduce evidence supporting the vague, conclusory allegations in the complaint is too late. There is no reason why these factual allegations could not have been presented earlier; instead the plaintiffs chose to wait until they lost their motions to remand and then decided to substantiate their factual allegations. Such sandbagging should not be countenanced by the courts. "[W]here a party attempts to introduce previously unsubmitted evidence on a motion for reconsideration, the court should not grant the motion absent some showing that the evidence was not available during the pendency of the motion." Mays v. United States Postal Service, 122 F.3d 43, 46 (11th Cir. 1997).

Additionally, the issues raised in the motions to remand and motions for reconsideration are not of the nature warranting an interlocutory appeal. Instead, they present the straight-forward issue of fraudulent joinder. This is not an [sic] controlling issue as to which there is "substantial ground for difference of opinion." 28 U.S.C. § 1292(b).

For the foregoing reasons, the motions for reconsideration or, alternatively, for interlocutory appeal are DENIED.

SO ORDERED, this 14th day of July, 1998.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-08893

IN RE:

CLEO JONES, EVELYN V. PATTON, CLAUDE MORRIS PIKE, CLAYTON LEWIS HALL, NEBRASKA GREER, et al.,

Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Georgia

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(Filed Aug. 6, 1998)

BEFORE: HATCHETT, Chief Judge, TJOFLAT and BIRCH, Circuit Judges.

BY THE COURT:

Petitioners' petition for writ of mandamus is DENIED.

APPENDIX D

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recovery less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

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28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for

the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which

such civil action is removed did not have jurisdiction over that claim.

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28 U.S.C. § 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service of otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except

that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order

an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

§ 28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject

matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

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28 U.S.C. § 1448. Process after removal

In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case.

APPENDIX E

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CLEO JONES, Individually and as Personal Representative of the Heirs and Estate of ISAIAH JONES, JR., Deceased; EVELYN V. PATTON, Individually and as Personal Representative of the Heirs and Estate of ANNIE KIRKSEY PATTON, Deceased; CLAUDE MORRIS PIKE; CLAYTON LEWIS HALL; NEBRASKA GREER; RAY HARDIN HOLLINGSWORTH; SIM COATS; RUBEN EDWARD ROBINSON, SR. and CHRYSOBEL ROBINSON; GARLAND EDWARD WOODS; and GEORGE WASHINGTON RAYE; and BARBARA ANN HOFFMAN and FREDERICK HOFFMAN,	) CIVIL ACTION) FILE NO. E65092) (Filed Nov. 26, 1997)
Plaintiffs,	
VS.	
GEORGIA PACIFIC CORPORATION (successor to BESTWALL GYPSUM COMPANY); THE ANCHOR PACKING COMPANY; AQUA-CHEM, INC. (d/b/a CLEAVER-BROOKS DIVISION); ASTEN, INC.;	

COMBUSTION ENGINEERING,)
INC.; CROWN CORK AND SEAL)
COMPANY, INC. (successor to)
MUNDET CORK COMPANY); THE)
FLINTKOTE COMPANY; FOSTER)
WHEELER ENERGY)
CORPORATION; GARLOCK INC.;)
GENERAL ELECTRIC COMPANY;)
GREFCO, INC.; HARBISON-)
WALKER REFRACTORIES)
COMPANY (formerly a division of)
INDRESCO INC.); INDRESCO)
INC. (successor to HARBISON-)
WALKER REFRACTORIES)
COMPANY, a division of)
INDRESCO, INC.); KELLY-MOORE)
PAINT COMPANY, INC.;)
METROPOLITAN LIFE)
INSURANCE COMPANY;)
MINNESOTA MINING AND)
MANUFACTURING COMPANY)
(a/k/a "3M"); NORTH)
AMERICAN REFRACTORIES)
COMPANY; OWENS-CORNING,)
f/k/a OWENS-CORNING)
FIBERGLAS CORPORATION)
(d/b/a OWENS CORNING)
CORPORATION); PITTSBURGH)
CORNING CORPORATION)
(successor to UNARCO)
INDUSTRIES, INC.); PROKO)
INDUSTRIES, INC.; SYNKOLOID,)
A DIVISION OF MURALO CO.,)
INC.; UNIROYAL HOLDING, INC.)
(successor to U. S. RUBBER)
COMPANY); U.S. MINERAL)

PRODUCTS COMPANY; W. R.)
GRACE & CO.-CONN. (successor)
to W. R. GRACE & COMPANY);)
A. P. GREEN INDUSTRIES, INC.)
(f/k/a A. P. GREEN)
REFRACTORIES COMPANY, a)
subsidiary of U. S. GYPSUM)
COMPANY); ARMSTRONG)
WORLD INDUSTRIES, INC.)
(successor to ARMSTRONG CORK)
COMPANY); ASBESTOS CLAIMS)
MANAGEMENT CORPORATION)
(c/o NEW NATIONAL GYPSUM)
COMPANY, f/k/a NATIONAL)
GYPSUM COMPANY);)
CERTAINTEED CORPORATION;)
DANA CORPORATION; GAF)
CORPORATION (successor to)
RUBEROID CORPORATION);)
GASKET HOLDING, INC., f/k/a)
FLEXITALLIC INC. (successor to)
FLEXITALLIC GASKET)
COMPANY); QUIGLEY COMPANY,)
INC.; U.S. GYPSUM COMPANY;)
ALLIED-SIGNAL, INC. (successor)
to THE BENDIX CORPORATION);)
BORG-WARNER CORPORATION;)
CHRYSLER CORPORATION; FORD)
MOTOR COMPANY; GENERAL)
MOTORS CORPORATION;)
PNEUMO ABEX CORPORATION)
(successor to ABEX)
CORPORATION and AMERICAN)
BRAKE SHOE CO.); MOOG)
AUTOMOTIVE INC., (successor to)
WAGNER ELECTRIC)
CORPORATION); THE)

MAREMONT CORPORATION (a subsidiary of ARVIN INDUSTRIES, INC. and successor to GRIZZLY MANUFACTURING CO.); USX CORPORATION; and, JOHN DOES 1 through 5, who are individuals, proprietorships, corporations or other entities whose names and identities are otherwise unknown to Plaintiffs,

Defendants.

PLAINTIFFS' ORIGINAL ASBESTOS COMPLAINT AND JURY DEMAND

COME NOW, Plaintiffs (the name and residence of each Plaintiff is shown on the attached Exhibit "A" and incorporated herein for all purposes) complaining of the various Defendants listed below and for cause of action would show the Court and Jury as follows:

1. Defendant GEORGIA-PACIFIC CORPORATION, being incorporated and having its principal place of business in Georgia, may be served with process by the sheriff's office of Fulton County, through its registered agent, C. T. Corporation Systems, 1201 Peachtree Street, NE, Atlanta, Fulton County, Georgia 30303. Said corporation is being sued individually and as successor-in-interest to BESTWALL GYPSUM COMPANY.

2. Although Defendant THE ANCHOR PACKING COMPANY, being incorporated in Delaware and having its principal place of business in New York, has at all times relevant to this litigation conducted business in this State, it has withdrawn thereby revoking the authority of

its registered agent to accept service on its behalf. Therefore, Defendant THE ANCHOR PACKING COMPANY may be served with the Complaint and an accompanying Affidavit, by the sheriff's office of Fulton County, through the Secretary of State for the State of Georgia pursuant to O.C.G.A. § 9-11-4(d)(1). A copy of the process, by registered mail, return receipt requested shall also be served upon the address listed in the corporation's certificate for withdrawal, Coltec Industries, Inc., Attn. Chief Executive Officer, 430 Park Avenue, New York, New York County, New York 10022 pursuant to the O.C.G.A. §§ 14-2-1510 and 14-2-1520. Defendant THE ANCHOR PACKING COMPANY is subject to the jurisdiction of the courts of the State of Georgia under Georgia's long-arm statute, O.C.G.A. § 9-10-91. Therefore, pursuant to O.C.G.A. § 9-10-94, said corporation may be served with process of a Second Original Complaint properly issued by the clerk of Fulton County, by a person authorized to make service by the laws of the State of New York, through its corporate headquarters, 430 Park Avenue, New York, New York County, New York 10022.

3. Defendant AQUA-CHEM, INC. (d/b/a CLEAVER-BROOKS DIVISION), being incorporated in Delaware and having its principal place of business in Wisconsin, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C. T. Corporation Systems, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361.

4. Defendant ASTEN, INC., being incorporated in Delaware and having its principal place of business in South Carolina, may be served with process, by the sheriff's office of Fulton County, through its registered agent,

Corporation Service Company, 100 Peachtree Street, Atlanta, Fulton County, Georgia 30303.

5. Defendant COMBUSTION ENGINEERING, INC., being incorporated in Delaware and having its principal place of business in Connecticut, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C.T. Corporation Systems, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361.

6. Although Defendant CROWN CORK AND SEAL COMPANY, INC., being incorporated and having its principal place of business in Pennsylvania, has at all times relevant to this litigation conducted business in this State, it has withdrawn thereby revoking the authority of its registered agent to accept service on its behalf. Therefore, Defendant CROWN CORK AND SEAL COMPANY, INC. may be served with the Complaint and accompanying Affidavit, by the sheriff's office of Fulton County, through the Secretary of State for the State of Georgia. A copy of the process, by registered mail, return receipt requested shall also be served upon the address listed in the corporation's certificate for withdrawal, Attn. Chief Executive Officer, One Crown Way, Philadelphia, Philadelphia County, Pennsylvania 19154-4599 pursuant to the O.C.G.A. §§ 14-2-1510 and 14-2-1520. Defendant CROWN CORK AND SEAL COMPANY, INC. is subject to the jurisdiction of the courts of the State of Georgia under Georgia's long-arm statute, O.C.G.A. § 9-10-91. Therefore, pursuant to O.C.G.A. § 9-10-94, said corporation may be served with process of a Second Original Complaint properly issued by the clerk of Fulton County, by a person authorized to make service by the laws of the State of

Pennsylvania, through its corporate headquarters, 9300 Ashton Road, Philadelphia, Philadelphia County, Pennsylvania 19136. Said corporation is being sued individually and as successor-in-interest to MUNDET CORK COMPANY.

7. Although Defendant THE FLINTKOTE COMPANY, being incorporated in Delaware and having its principal place of business in Connecticut, has at all times relevant to this litigation conducted business in this State, it has withdrawn thereby revoking the authority of its registered agent to accept service on its behalf. Therefore, Defendant THE FLINTKOTE COMPANY may be served with the Complaint and accompanying Affidavit, by the sheriff's office of Fulton County, through the Secretary of State for the State of Georgia. A copy of the process, by registered mail, return receipt requested, shall also be served upon the address listed in the corporation's certificate for withdrawal, Attn. Chief Executive Officer, Two Embarcadero Center, Suite 1600, San Francisco, San Francisco County, California 94111, pursuant to the O.C.G.A. §§ 14-2-1510 and 14-2-1520. Defendant THE FLINTKOTE COMPANY is subject to the jurisdiction of the courts of the State of Georgia under Georgia's long-arm statute, O.C.G.A. § 9-10-91. Therefore, pursuant to O.C.G.A. § 9-10-94, said corporation may be served with process of a Second Original Complaint properly issued by the clerk of Fulton County, by a person authorized to make service by the laws of the State of California, through its corporate headquarters, Two Embarcadero Center, Suite 1600, San Francisco, San Francisco County, California 94111.

8. Defendant FOSTER WHEELER ENERGY CORPORATION, being incorporated in Delaware and having

its principal place of business in New Jersey, may be served with process, by the sheriff's office of Fulton County, through its registered agent, U S Corp. Co., 100 Peachtree Street, Atlanta, Fulton County, Georgia 30303.

9. Defendant GARLOCK INC., being incorporated in Ohio and having its principal place of business in North Carolina, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C. T. Corporation Systems, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361.

10. Defendant GENERAL ELECTRIC COMPANY, being incorporated and having its principal place of business in New York, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C.T. Corporation Systems, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361.

11. Although Defendant GREFCO, INC., being incorporated in Delaware and having its principal place of business in California, has at all times relevant to this litigation conducted business in this State, it has withdrawn thereby revoking the authority of its registered agent to accept service on its behalf. Therefore, Defendant GREFCO, INC. may be served with the Complaint and an accompanying Affidavit, by the sheriff's office of Fulton County, through the Secretary of State for the State of Georgia. A copy of the process, by registered mail, return receipt requested, shall also be served upon the address listed in the corporation's certificate for withdrawal, Attn. Chief Executive Officer, 3435 West Lomita Blvd., Torrance, Los Angeles County, California 90509,

pursuant to O.C.G.A. §§ 14-2-1510 and 14-2-1520. Defendant GREFCO, INC. is subject to the jurisdiction of the courts of the State of Georgia under Georgia's long-arm statute, O.C.G.A. § 9-10-91. Therefore, pursuant to O.C.G.A. § 9-10-94, said corporation may be served with process of a Second Original Complaint properly issued by the clerk of Fulton County, by a person authorized to make service by the laws of the State of Pennsylvania, through its corporate headquarters, 225 City Line Avenue, Suite 114, Bala Cynwad, Montgomery County, Pennsylvania 19004.

12. Defendant HARBISON-WALKER REFRACTORIES COMPANY (formerly a division of INDRESCO INC.), being incorporated in Delaware and having its principal place of business in Pennsylvania, may be served with process, by the sheriff's office of Fulton County, through its registered agent, Prentice Hall Corporation, 100 Peachtree Street, Atlanta, Fulton County, Georgia 30303.

13. Defendant INDRESCO INC., being incorporated in Delaware and having its principal place of business in Pennsylvania, may be served with process, by the sheriff's office of Fulton County, through its registered agent, Prentice Hall Corporation, 100 Peachtree Street, Atlanta, Fulton County, Georgia 30303. Said corporation is being sued individually and as successor-in-interest to HARBISON-WALKER REFRACTORIES COMPANY, a division of INDRESCO, INC.

14. Defendant KELLY-MOORE PAINT COMPANY, INC., being incorporated and having its principal place of business in California, is subject to the jurisdiction of the

courts of the State of Georgia under Georgia's long-arm statute, O.C.G.A. § 9-10-91. Therefore, pursuant to O.C.G.A. § 9-10-94, said corporation may be served with process of a Second Original Complaint properly issued by the clerk of Fulton County, by a person authorized to make service by the laws of the State of California, through its corporate headquarters, 987 Commercial Street, San Carlos, San Mateo County, California 97070.

15. Defendant METROPOLITAN LIFE INSURANCE COMPANY, being incorporated and having its principal place of business in New York, may be served with process of a Second Original Complaint properly issued by the Fulton County clerk, by the sheriff's office of DeKalb County, through its registered agent, Hoenig Gerald, 303 Perimeter Center N., Suite 600, Atlanta, DeKalb County, Georgia 30346.

16. Defendant MINNESOTA MINING AND MANUFACTURING COMPANY, a/k/a "3M" (hereafter referred to as "3M"), being incorporated in Delaware and having its principal place of business in Minnesota, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C.T. Corporation Systems, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361.

17. Defendant NORTH AMERICAN REFRACTORIES COMPANY, being incorporated and having its principal place of business in Ohio, is subject to the jurisdiction of the courts of the State of Georgia under Georgia's long-arm statute, O.C.G.A. § 9-10-91. Therefore, pursuant to O.C.G.A. § 9-10-94, said corporation may be served with process of a Second Original Complaint

properly issued by the clerk of Fulton County, by a person authorized to make service by the laws of the State of Ohio, through its corporate headquarters, 500 Halle Building, Cleveland, Cuyahoga County, Ohio 44115.

18. Defendant OWENS-CORNING (hereafter referred to as "OC"), f/k/a OWENS-CORNING FIBERGLAS CORPORATION (a/k/a OWENS CORNING CORPORATION), being incorporated in Delaware and having its principal place of business in Ohio, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C. T. Corporation Systems, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361.

19. Defendant PITTSBURGH CORNING CORPORATION, being incorporated and having its principal place of business in Pennsylvania, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C.T. Corporation Systems, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361. Said corporation is being sued individually and as successor-in-interest to UNARCO INDUSTRIES, INC.

20. Defendant PROKO INDUSTRIES, INC., being incorporated and having its principal place of business in Texas, may be served with process of a Second Original Complaint properly issued by the Fulton County clerk, by the sheriff's office of Ware County, through its registered agent, Cynthia McKinnon, 2851 Industrial Blvd., Waycross, Ware County, Georgia 75150.

21. Defendant SYNKOLOID, A DIVISION OF MURALO CO., INC., being incorporated and having its principal place of business in New Jersey, may be served

with process, by the sheriff's office of Fulton County, through The Muralo Company, Inc.'s registered agent, United States Corporation Co., 100 Peachtree Street, Atlanta, Fulton County, Georgia 30303.

22. Defendant UNIROYAL HOLDING, INC., being incorporated in New Jersey and having its principal place of business in Connecticut, may be served with process of a Second Original Complaint properly issued by the Fulton County clerk, by the sheriff's office of Cobb County, through its registered agent, Corporation Process System, 180 Cherokee Street, Marietta, Cobb County, Georgia 30060. Said corporation is being sued individually and as successor-in-interest to U.S. RUBBER COMPANY.

23. Defendant U.S. MINERAL PRODUCTS COMPANY, being incorporated and having its principal place of business in New Jersey, is subject to the jurisdiction of the courts of the State of Georgia under, Georgia's long-arm statute, O.C.G.A. § 9-10-91. Therefore, pursuant to O.C.G.A. § 9-10-94, said corporation may be served with process of a Second Original Complaint properly issued by the clerk of Fulton County, by a person authorized to make service by the laws of the State of New Jersey, through its corporate headquarters, 41 Furnace Street, Stanhope, Sussex County, New Jersey 07874.

24. Defendant W. R. GRACE & CO.-CONN., being incorporated in Connecticut and having its principal place of business in Florida, may be served with process, by the sheriff's office of Fulton County, through its registered agent, Prentice-Hall Corporation Systems, 100 Peachtree Street, Atlanta, Fulton County, Georgia 30303.

Said corporation is being sued individually and as successor-in-interest to W. R. GRACE & COMPANY.

25. Defendant A. P. GREEN INDUSTRIES, INC. (f/k/a A. P. GREEN REFRACTORIES COMPANY, a subsidiary of U. S. GYPSUM COMPANY), being incorporated in Delaware and having its principal place of business in Missouri, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C. T. Corporation Systems, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361.

26. Defendant ARMSTRONG WORLD INDUSTRIES, INC., being incorporated and having its principal place of business in Pennsylvania, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C. T. Corporation Systems, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361. Said corporation is being sued individually and as successor-in-interest to ARMSTRONG CORK COMPANY.

27. Although Defendant ASBESTOS CLAIMS MANAGEMENT CORPORATION (c/o NEW NATIONAL GYPSUM, f/k/a NATIONAL GYPSUM COMPANY), being incorporated in Delaware and having its principal place of business in Texas, has at all times relevant to this litigation conducted business in this State, it has withdrawn thereby revoking the authority of its registered agent to accept service on its behalf. Therefore, Defendant ASBESTOS CLAIMS MANAGEMENT CORPORATION may be served with the Complaint and an accompanying affidavit, by the sheriff's office of Fulton County, through the Secretary of State for the State of Georgia. A copy of the process, by registered mail, return

receipt requested, shall also be served upon the address listed in the corporation's certificate for withdrawal, Attn. Chief Executive Officer, 2001 Rexford Road, Charlotte, Mecklenburg County, North Carolina 28211, pursuant to the O.C.G.A. §§ 14-2-1510 and 14-2-1520. Defendant ASBESTOS CLAIMS MANAGEMENT CORPORATION is subject to the jurisdiction of the courts of the State of Georgia under Georgia's long-arm statute, O.C.G.A. § 9-10-91. Therefore, pursuant to O.C.G.A. § 9-10-94, said corporation may be served with process of a Second Original Complaint properly issued by the clerk of Fulton County, by a person authorized to make service by the laws of the State of Texas, through its corporate headquarters, 2608 Eastland Avenue, Suite # 202, Greenville, Dallas County, Texas 75402.

28. Defendant CERTAINTEED CORPORATION, being incorporated in Delaware and having its principal place of business in Pennsylvania, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C. T. Corporation Systems, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361.

29. Defendant DANA CORPORATION, being incorporated in Virginia and having its principal place of business in Ohio, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C. T. Corporation Systems, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361.

30. Although Defendant GAF CORPORATION, being incorporated in Delaware and having its principal place of business in New Jersey, has at all times relevant

to this litigation conducted business in this State, it has withdrawn thereby revoking the authority of its registered agent to accept service on its behalf. Therefore, Defendant GAF CORPORATION may be served with the Complaint and an accompanying affidavit, by the sheriff's office of Fulton County, through the Secretary of State for the State of Georgia. A copy of the process, by registered mail, return receipt requested, shall also be served upon the address listed in the corporation's certificate for withdrawal, Attn. Chief Executive Officer, 1361 Alps Rd., Wayne, Passaic County, New Jersey 07470, pursuant to the O.C.G.A. §§ 14-2-1510 and 14-2-1520. Defendant GAF CORPORATION is subject to the jurisdiction of the courts of the State of Georgia under Georgia's long-arm statute, O.C.G.A. § 9-10-91. Therefore, pursuant to O.C.G.A. § 9-10-94, said corporation may be served with process of a Second Original Complaint properly issued by the clerk of Fulton County, by a person authorized to make service by the laws of the State of New Jersey, through its corporate headquarters, 1361 Alps Rd., Wayne, Passaic County, New Jersey 07470. Said corporation is being sued individually and as successor-in-interest to RUBEROID CORPORATION.

31. Defendant GASKET HOLDING, INC., f/k/a FLEXITALLIC, INC., being incorporated in Delaware and having its principal place of business in Michigan, is subject to the jurisdiction of the courts of the State of Georgia under Georgia's long-arm statute, O.C.G.A. § 9-10-91. Therefore, pursuant to O.C.G.A. § 9-10-94, said corporation may be served with process of a Second Original Complaint properly issued by the clerk of Fulton County, by a person authorized to make service by the

laws of the State of Texas, through its corporate headquarters, Post Office Box 760, 6915 LaPorte Road, Deer Park, Harris County, Texas 77536. Said corporation is being sued individually and as successor-in-interest to FLEXITALLIC GASKET COMPANY.

32. Defendant QUIGLEY COMPANY, INC., being incorporated and having its principal place of business in New York, is subject to the jurisdiction of the courts of the State of Georgia under Georgia's long-arm statute, O.C.G.A. § 9-10-91. Therefore, pursuant to O.C.G.A. § 9-10-94, said corporation may be served with process of a Second Original Complaint properly issued by the clerk of Fulton County, by a person authorized to make service by the laws of the State of New York, through its corporate headquarters, 235 East 42nd Street, 5th Floor, New York, New York County, New York 10017.

33. Defendant U. S. GYPSUM COMPANY, being incorporated in Delaware and having its principal place of business in Illinois, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C. T. Corporation Systems, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361.

34. Defendant ALLIED-SIGNAL, INC., being incorporated in Delaware and having its principal place of business in New Jersey, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C.T. Corporation System, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361. Said corporation is being sued individually and as successor-in-interest to THE BENDIX CORPORATION. Hereinafter, the terms "Defendant" or "Defendants" shall apply to

Defendant ALLIED-SIGNAL, INC. in the claims brought by Plaintiff CLAUDE MORRIS PIKE only. Only Plaintiff CLAUDE MORRIS PIKE is bringing claims herein against Defendant ALLIED-SIGNAL, INC.

35. Defendant BORG-WARNER CORPORATION, being incorporated Delaware and having its principal place of business in Michigan, is subject to the jurisdiction of the courts of the State of Georgia under Georgia's long-arm statute, O.C.G.A. § 9-10-91. Therefore, pursuant to O.C.G.A. § 9-10-94, said corporation may be served with process of a Second Original Complaint properly issued by the clerk of Fulton County, by a person authorized to make service by the laws of the State of Illinois, through its corporate headquarters, 200 South Michigan, Chicago, Cook County, Illinois 60604. Per request of the BORG-WARNER CORPORATION, the corporation may also be served with process through Laurene Horiszny, Borg Warner, 6700 18 1/2 Mile Road, P.O. Box 8022, Sterling Heights, Macomb County, Michigan 48311-8022. Hereinafter, the terms "Defendant" or "Defendants" shall apply to Defendant BORG-WARNER CORPORATION in the claims brought by Plaintiff CLAUDE MORRIS PIKE only. Only Plaintiff CLAUDE MORRIS PIKE is bringing claims herein against Defendant BORG-WARNER CORPORATION.

36. Defendant CHRYSLER CORPORATION, being incorporated in Delaware and having its principal place of business in Michigan, may be served with process of a Second Original Complaint properly issued by the Fulton County clerk, by the sheriff's office of Cobb County,

through its registered agent, Corporation Process Company, 180 Cherokee Street, Marietta, Cobb County, Georgia 30060. Hereinafter, the terms "Defendant" or "Defendants" shall apply to Defendant CHRYSLER CORPORATION in the claims brought by Plaintiff CLAUDE MORRIS PIKE only. Only Plaintiff CLAUDE MORRIS PIKE is bringing claims herein against Defendant CHRYSLER CORPORATION.

37. Defendant FORD MOTOR COMPANY, being incorporated in Delaware and having its principal place of business in Michigan, may be served with process of a Second Original Complaint properly issued by the Fulton County clerk, by the sheriff's office of Cobb County, through its registered agent, Corporation Process Company, 180 Cherokee Street, Marietta, Cobb County, Georgia 30060. Hereinafter, the terms "Defendant" or "Defendants" shall apply to Defendant FORD MOTOR COMPANY in the claims brought by Plaintiff CLAUDE MORRIS PIKE only. Only Plaintiff CLAUDE MORRIS PIKE is bringing claims herein against Defendant FORD MOTOR COMPANY.

38. Defendant GENERAL MOTORS CORPORATION, being incorporated in Delaware and having its principal place of business in Michigan, may be served with process of a Second Original Complaint properly issued by the Fulton County clerk, by the sheriff's office of Cobb County, through its registered agent, Corporation Process Company, 180 Cherokee Street, Marietta, Cobb County, Georgia 30060. Hereinafter, the terms "Defendant" or "Defendants" shall apply to Defendant GENERAL MOTORS CORPORATION in the claims brought by Plaintiff CLAUDE MORRIS PIKE only. Only

Plaintiff CLAUDE MORRIS PIKE is bringing claims herein against Defendant GENERAL MOTORS CORPORATION.

39. Defendant PNEUMO ABEX CORPORATION, being incorporated in Delaware and having its principal place of business in New York, may be served with process, by the sheriff's office of Fulton County, through its registered agent, Prentice-Hall Corporation System, Inc., 66 Luckie Street, Atlanta, Fulton County, Georgia 30303. Said corporation is being sued individually and as successor-in-interest to ABEX CORPORATION and AMERICAN BRAKE SHOE CO. Hereinafter, the terms "Defendant" or "Defendants" shall apply to Defendant PNEUMO ABEX CORPORATION in the claims brought by Plaintiff CLAUDE MORRIS PIKE only. Only Plaintiff CLAUDE MORRIS PIKE is bringing claims herein against Defendant PNEUMO ABEX CORPORATION.

40. Defendant MOOG AUTOMOTIVE, INC., being incorporated in Missouri and having its principal place of business in Texas, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C.T. Corporation System, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361. Said corporation is being sued individually and as successor-in-interest to WAGNER ELECTRIC CORPORATION. Hereinafter, the terms "Defendant" or "Defendants" shall apply to Defendant MOOG AUTOMOTIVE, INC. in the claims brought by Plaintiff CLAUDE MORRIS PIKE only. Only Plaintiff CLAUDE MORRIS PIKE is bringing claims herein against Defendant MOOG AUTOMOTIVE, INC.

41. Defendant THE MAREMONT CORPORATION (a subsidiary of ARVIN INDUSTRIES, INC.), being incorporated in Delaware and having its principal place of business in Indiana, may be served with process, by the sheriff's office of Fulton County, through its registered agent, C.T. Corporation System, 1201 Peachtree Street NE, Atlanta, Fulton County, Georgia 30361. Said corporation is being sued individually and as successor-in-interest to GRIZZLY MANUFACTURING CO. Hereinafter, the terms "Defendant" or "Defendants" shall apply to Defendant THE MAREMONT CORPORATION in the claims brought by Plaintiff CLAUDE MORRIS PIKE only. Only Plaintiff CLAUDE MORRIS PIKE is bringing claims herein against Defendant THE MAREMONT CORPORATION.

42. Defendant USX CORPORATION, being incorporated and having its principal place of business in Pennsylvania, may be served with process, by the sheriff's office of Fulton County, through USX Corporation's registered agent, Prentice Hall Corporation System, 100 Peachtree Street, Atlanta, Fulton County, Georgia 30303. Hereinafter, the terms "Defendant" or "Defendants" shall apply to Defendant USX CORPORATION, in the claims brought by Plaintiffs BARBARA HOFFMAN and FRED HOFFMAN, only. Only Plaintiffs BARBARA HOFFMAN and FRED HOFFMAN are bringing claims herein against Defendant USX CORPORATION.

43. Venue of this action is proper in Fulton County. Several of the corporate defendants reside in Fulton County by virtue of the fact that their registered agents reside here. Venue is appropriate with regard to the remaining defendants by virtue of the fact that they are joint tortfeasors with the resident defendants.

44. Plaintiffs are properly joined in this action pursuant to O.C.G.A. § 9-11-20. Plaintiffs' causes of action arise out of the same occurrence or series of occurrences and involve common questions of law and fact.

45. Each Defendant corporation or its predecessor-in-interest, with the exception of the Metropolitan Life Insurance Company, is, or at times material hereto, has been engaged in the mining, processing and/or manufacturing, sale and distribution of asbestos and asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products.

46. Plaintiffs would show that for a period of many years, either they or Plaintiffs' decedents worked with and/or were exposed to asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products while working in various shipyards, steel mills, refineries, paper mills, chemical plants and/or other facilities in the United States. Plaintiffs would show that either they or Plaintiffs' decedents have been exposed, on numerous occasions, to asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products produced and/or sold by Defendants and, in so doing, have inhaled great quantities of asbestos fibers. Further Plaintiffs allege, as more specifically set out below, that either they or Plaintiffs' decedents have suffered injuries, diseases and/or death proximately caused by their exposure to asbestos-containing products designed, manufactured and sold by Defendants.

47. Plaintiffs allege that either they or Plaintiffs' decedents were exposed to asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products in their occupations. In that each exposure to such products caused or contributed to Plaintiffs' and Plaintiffs' decedents' injuries, diseases and/or death, Plaintiffs say that the doctrine of joint and several liability should be extended to apply to each Defendant herein.

48. In the event that Plaintiffs are unable to identify each injurious exposure to asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products, they would show the Court that the Defendants named herein represent and/or represented a substantial share of the relevant market of asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products at all times material to the cause of action. Consequently, each Defendant should be held jointly and severally liable under the doctrines of enterprise liability, market-share liability, concert of action and alternative liability, among others.

COUNT ONE

49. The illnesses, diseases and disabilities of Plaintiffs and Plaintiffs' decedents are a direct and proximate result of the negligence of each Defendant and/or its predecessor-in-interest in that said entities produced, sold and/or otherwise put into the stream of commerce, asbestos, asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or

asbestos-containing products, which the Defendants knew, or in the exercise of ordinary care, should have known were deleterious and highly harmful to Plaintiffs' health and well-being. The Defendants were negligent in one, some and/or all of the following respects, among others, same being the proximate cause of Plaintiffs' and Plaintiffs' decedents illnesses, diseases, disabilities and/or death:

a. in failing to timely and adequately warn Plaintiffs and Plaintiffs' decedents of the dangerous characteristics and serious health hazards associated with exposure to asbestos, asbestos-containing products, and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products;

b. in failing to provide Plaintiffs and Plaintiffs' decedents with information as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances, if in truth there were any, to protect Plaintiffs and Plaintiffs' decedents from being harmed and disabled by exposure to asbestos, asbestos-containing products, and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products;

c. in failing to place timely and adequate warnings on the containers of said asbestos, or asbestos-containing products, or on the asbestos-containing products themselves, and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products to warn of the dangers to health of coming into contact with said asbestos-containing products and/or machinery;

d. in failing to take reasonable precautions or exercise reasonable care to publish, adopt and enforce a safety plan and/or safe method of handling and installing asbestos and/or asbestos-containing products, or utilizing the machinery requiring or calling for the use of asbestos and/or asbestos-containing products in a safe manner;

e. in failing to develop and utilize a substitute material to eliminate asbestos fibers in the asbestos-containing products, and/or the machinery requiring or calling for the use of asbestos and/or asbestos-containing products;

f. in failing to properly design and manufacture asbestos, asbestos-containing products, and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products for safe use under conditions of use that were reasonably anticipated;

g. in failing to properly test said asbestos-containing products or machinery before they were released for consumer use; and

h. in failing to recall and/or remove from the stream of commerce said asbestos-containing products or machinery requiring or calling for the use of asbestos and/or asbestos-containing products despite knowledge of the unsafe and dangerous nature of such products or machinery.

50. In addition to the aforesaid breaches, Plaintiffs would show that Defendant 3M acted with negligence as the designer and manufacturer of a respiratory device commonly known as a "dust mask." The illnesses, disabilities and/or death of Plaintiffs and Plaintiffs' decedents are a direct and proximate result of 3M's negligence in placing into the stream of commerce respiratory

devices defective in design and inadequate for the purposes for which they were intended, namely preventing the inhalation of dust, including asbestos dust, generated from construction and/or insulation activities.

51. 3M knew or should have known that workers would use and rely upon 3M's respiratory devices at sites where asbestos materials were commonly and extensively used which created substantial and constant quantities of dust and that 3M's respiratory devices would provide inadequate protection against the inhalation ~~of a~~sbestos dust.

52. Furthermore, 3M was negligent for failing to warn and/or properly instruct workers regarding the inadequacies of its respiratory devices for preventing the inhalation of asbestos dust.

53. Defendant USX was negligent, negligent per se and grossly negligent in that it failed to ensure that employees such as Plaintiff Barbara Hoffman's father, James Edwards, were protected from the inhalation of asbestos and asbestos fibers while employed by Defendant. Defendant's failure to protect Plaintiff's father was a proximate cause of Plaintiff's injuries and damages. Plaintiff's father, James Edwards was continuously exposed to asbestos while employed at the USX facility located in Birmingham, Alabama from 1948 until 1977.

54. Specific acts of negligence and gross negligence, committed by Defendant USX, which were a proximate cause of Plaintiff, Barbara Hoffman's injuries and damages include:

(a) Attempting to install, maintain and remove asbestos in Plaintiff Hoffman's father's workplace without taking adequate precautions for the protection of workers the vicinity and/or in the plant generally;

(b) Failing to provide proper protective gear for workers in the vicinity who were exposed to asbestos during the installation, maintenance and removal process;

(c) Failing to provide adequate ventilation to ensure that workers in the vicinity were not exposed to asbestos during the installation, maintenance, abatement and removal process;

(d) Failing to provide a proper and safe method for the handling of asbestos and asbestos fibers during the installation, maintenance, abatement and removal process at Plaintiff Hoffman's father's workplace;

(e) Failing to adhere to industry safe standards and other established measures to protect workers from harm;

(f) Failing to adequately warn of the extreme risk of danger inherent to asbestos exposure during the installation, maintenance and removal process.

55. Defendant USX CORPORATION breached the duty of reasonable care which it owed to Plaintiff, Barbara Hoffman and/or Plaintiff's father, James Edwards.

56. In breaching or materially assisting others in breaching their duties to the Plaintiffs or Plaintiffs' decedents, as described above, all of the Defendants acted intentionally, with gross negligence, recklessly, maliciously and wantonly in that the Defendants and each of them knew or should have known through data available

exclusively to them that asbestos was inherently and extraordinarily dangerous if used in the manner intended and foreseen by the Defendants, and that each of their aforesaid breaches of duty would result in the complained injuries, disabilities and/or death to the Plaintiffs and Plaintiffs' decedents.

COUNT TWO

57. All of the allegations contained in the previous paragraphs are realleged herein.

58. Plaintiffs and Plaintiffs' decedents were exposed to asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products that were manufactured and distributed by the Defendants and/or their predecessors-in-interest for use as construction materials and/or machinery in industrial operations. Plaintiffs would show that the defective condition of the products rendered such products not merchantable and reasonably suited to the use intended, and that the asbestos-containing products and/or machinery were in this defective condition at the time they left the hands of Defendants.

59. The Defendants' asbestos-containing products and/or machinery, without substantial change in the condition in which they were sold, were a proximate cause of the injuries and/or death of Plaintiffs and Plaintiffs' decedents.

60. Defendants knew that these asbestos-containing products and/or machinery would be used without

inspection for defects and, by placing them on the market, represented that they would safely do the job for which they were intended, which must necessarily include safe manipulation and/or installation of the asbestos-containing products and/or operation, maintenance and/or repair of the machinery requiring or calling for the use of asbestos and/or asbestos-containing products.

61. The risks inherent in the aforementioned asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products outweighed the utility of the asbestos-containing products and/or machinery of the Defendants.

62. Plaintiffs and Plaintiffs' decedents were unaware of the hazards and defects in the asbestos-containing products of the Defendants which made them unsafe for purposes of manipulation and/or installation. Similarly, Plaintiffs and Plaintiffs' decedents were unaware of the hazards and defects in the machinery requiring or calling for the use of asbestos and/or asbestos-containing materials.

63. During the periods that Plaintiffs and Plaintiffs' decedents were exposed to the asbestos-containing products and/or machinery of the Defendants, these asbestos-containing products and/or machinery were being utilized in a manner which was intended by Defendants.

64. In addition to the actions or omissions of Defendant set out above, Plaintiffs would show that Defendant 3M should be held strictly liable as the designer and manufacturer of the above-referenced respiratory

devices. The defective condition of such respiratory devices rendered them not merchantable and not fit for use as devices for protection against the inhalation of asbestos dust and fibers. Plaintiffs would further show that the respiratory devices were in a defective condition at the time that they left the hands of Defendant 3M.

65. Defendant 3M was engaged in the business of manufacturing and selling respiratory devices, commonly known as dust masks, and these products, without substantial change in the condition in which they were sold, were a proximate cause of the injuries and/or death of Plaintiffs and Plaintiffs' decedents.

66. Defendant 3M knew that its respiratory device would be used without inspection for defects and, by placing them on the market, represented that they would safely preclude the inhalation of asbestos fibers.

67. The risks inherent in the product design of Defendant 3M's respiratory device outweighed the utility of the product so designed.

68. Plaintiffs and Plaintiffs' decedents were unaware of the defects in the 3M respiratory devices which rendered them ineffective as protection against the inhalation of asbestos dust.

69. During the periods Plaintiffs and Plaintiffs' decedents used and relied upon Defendant's respiratory devices, the devices were utilized in a manner for which they were intended to be used.

70. The defective conditions of the Defendants' asbestos and/or asbestos-containing products and Defendant 3M's respiratory device proximately caused or contributed to the Plaintiffs' and Plaintiffs' decedents' injuries, diseases and/or death and damages as described in this Complaint.

COUNT THREE

71. All of the allegations contained in the previous paragraphs are realleged herein.

72. Plaintiffs further allege that Defendants and/or their predecessors-in-interest knowingly agreed, contrived, combined, confederated and conspired among themselves to cause Plaintiffs' and Plaintiffs' decedents' injuries, diseases, illnesses and/or death by exposing Plaintiffs and Plaintiffs' decedents to harmful and dangerous asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products. Defendants further knowingly agreed, contrived, combined, confederated and conspired to deprive Plaintiffs and Plaintiffs' decedents of the opportunity of informed free choice as to whether to use said asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products or to expose themselves to said dangers. In this connection, Plaintiffs have sued the Metropolitan Life Insurance Company in its capacity as a conspirator. Defendants committed the above described wrongs by willfully misrepresenting and suppressing the truth as to the risks and dangers associated with the use

of and exposure to Defendants' asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products.

73. In furtherance of said conspiracies, Defendants performed the following overt acts:

(a) for many decades, Defendants, individually, jointly, and in conspiracy with each other, have been in possession of medical and scientific data, literature and test reports which clearly indicated that the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products were unreasonably dangerous, hazardous, deleterious to human health, carcinogenic, and potentially deadly;

(b) despite the medical and scientific data, literature, and test reports possessed by and available to Defendants, Defendants individually, jointly, and in conspiracy with each other, fraudulently, willfully, and maliciously:

1. withheld, concealed and suppressed said medical and scientific data, literature and test reports regarding the risks of asbestosis, cancer, mesothelioma and other illnesses and diseases from Plaintiffs and Plaintiffs' decedents who were using and being exposed to Defendants' asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products;

2. caused to be released, published and disseminated medical and scientific data, literature

and test reports containing information and statements regarding the risks of asbestosis, cancer, mesothelioma and other illnesses and diseases, which Defendants knew were incorrect, incomplete, outdated and misleading; and

3. distorted the results of medical examinations conducted upon Plaintiffs and Plaintiffs' decedents and workers such as Plaintiffs and Plaintiffs' decedents who were using asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products and being exposed to the inhalation of asbestos dust and fibers by falsely stating and/or concealing the nature and extent of the harm to which Plaintiffs and Plaintiffs' decedents and workers such as Plaintiffs and Plaintiffs' decedents have suffered.

(c) In addition, Defendant OC has and continues to engage in a pattern of fraudulent conduct against asbestos Plaintiffs, including these Plaintiffs and Plaintiffs' decedents, as well as various courts and juries. Specifically, OC has deliberately and continuously misrepresented the status of its knowledge regarding the dangerous propensities of asbestos generally, and OC's own asbestos products. In prior litigation regarding the same subject matter, OC has made a statement under oath that OC knew was patently false and specifically involved OC's denial that use of its products containing asbestos fibers could cause asbestosis. Moreover, OC has deliberately filed false statements in various courts and has specifically perpetrated a fraud against courts

in the state of Georgia concerning the issue of its knowledge about the dangers of asbestos from its products at various times. As such, OC has generally been involved in a deceptive pattern and practice directed against asbestos Plaintiffs, including these Plaintiffs and Plaintiffs' decedents, in an effort to mislead various courts and juries; and

(d) by the false and fraudulent representations, omissions and concealments set forth above, Defendants, individually, jointly, and in conspiracy with each other, intended to induce the Plaintiffs and Plaintiffs' decedents to rely upon said false and fraudulent representations, omissions and concealments, to continue to expose themselves to the dangers inherent in the use of and exposure to Defendants' asbestos-containing products, and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products.

74. Plaintiffs and Plaintiffs' decedents reasonably and in good faith relied upon the false and fraudulent representations, omissions and concealments made by the Defendants regarding the nature of their asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products.

75. As a direct and proximate result of Plaintiffs' and Plaintiffs' decedents reliance on Defendants' false and fraudulent representations, omissions and concealments, Plaintiffs have sustained damages including injuries, illnesses, diseases, disabilities and/or death, and have been deprived of the opportunity of informed free

choice in connection with the use of and exposure to Defendants' asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products.

76. Moreover, Defendants continue to contrive, combine, confederate and conspire among themselves to injure Plaintiffs and to deprive Plaintiffs of their rightful recoveries by joining together and forming an entity known as the "Asbestos Claims Facility" and/or "Center for Claims Resolution" and by proposing and entering into an agreement known as the "Wellington Agreement." As a direct and proximate result of Defendants' ongoing actions, Plaintiffs continue to sustain damages.

COUNT FOUR

77. All of the allegations contained in the previous paragraphs are realleged herein.

78. The actions and inactions of Defendants and their predecessors-in-interest, as specifically alleged hereinabove, whether taken separately or together, were of such a character as to constitute a pattern or practice of intentional wrongful conduct and/or malice resulting in damages, injuries and/or death to the Plaintiffs and Plaintiffs' decedents. More specifically, Defendants and their predecessors-in-interest, consciously and/or deliberately engaged in willful misconduct, malice, fraud, wantonness, oppression, and/or entire want of care raising the presumption of conscious indifference to consequences with regard to the Plaintiffs and Plaintiffs' decedents and should be held liable in punitive and exemplary damages.

COUNT FIVE

79. All of the allegations contained in the previous paragraphs are realleged herein.

80. Defendant Metropolitan Life Insurance Company through its Policyholders Service Bureau undertook duties owed by the asbestos-producing Defendants to the Plaintiffs and Plaintiffs' decedents by the testing of asbestos workers and the conduct of scientific studies. These duties included without limitation, the duties:

(a) to test fully and adequately for health risks concomitant to the normal and intended use of their products; and

(b) to instruct fully and adequately in the uses of their products so as to eliminate or reduce the health hazards concomitant with their normal or intended use.

In undertaking these duties, Metropolitan Life knew or should have known that it was providing testing services for the ultimate protection of third persons, including the Plaintiffs and Plaintiffs' decedents.

81. In both conducting said tests and in publishing their alleged results, Metropolitan Life failed to exercise reasonable care to conduct or publish complete, adequate and accurate tests of the health effects of asbestos. Metropolitan Life also caused to be published intentionally false, misleading, inaccurate and deceptive information about the health effects of asbestos exposure.

82. The Plaintiffs and Plaintiffs' decedents unwittingly but justifiably relied upon the thoroughness of Metropolitan Life's tests and information dissemination,

the results of which Metropolitan Life published in leading medical journals.

83. As a direct and proximate contributing result of Metropolitan Life's failures to conduct or accurately publish adequate tests or disseminate accurate and truthful information, after undertaking to do so; (i) the risk of harm to the Plaintiffs and Plaintiffs' decedents from asbestos exposure was increased, and (ii) the Plaintiffs and Plaintiffs' decedents suffered the injuries described below.

84. In failing to test fully and adequately for the adverse health effects from exposure to asbestos; in delaying the publication of such results; and in falsely editing such results as were obtained; in suppressing relevant medical inquiry and knowledge about those hazards to promote the sale and distribution of asbestos as a harmless product; and in collaborating with the asbestos-producing Defendants materially to understate the hazards of asbestos exposure, all for its own profit and gain, Metropolitan Life acted recklessly, wantonly, and in calculated disregard for the welfare of the general public, including the Plaintiffs and Plaintiffs' Decedents.

COUNT SIX

85. All of the allegations contained in the previous paragraphs are realleged herein.

86. The actions of all Defendants aided, abetted, encouraged, induced or directed the negligent and/or intentional acts of each and every other Defendant.

87. Each of the Defendants knew or should have known that its individual actions would combine to cause the injuries and/or death of the Plaintiffs or Plaintiffs' decedents.

88. The actions of each of the Defendants is a proximate cause of Plaintiffs' and Plaintiffs' decedents' injuries, diseases and/or death. As a result, all Defendants, found to be negligent, are jointly and severally liable for the damages caused by their combined actions and such negligent Defendants and Defendants, found liable in strict liability, are jointly liable for these damages.

DAMAGES

89. ("Plaintiffs" when mentioned in paragraph 85 excludes any Plaintiff who is a representative of an estate of a decedent as these Plaintiffs are not making any claims in this cause of action for bodily injuries, illness or disease to themselves as a result of exposure to asbestos.) As a direct and proximate result of Defendants' tortious conduct as aforesaid, Plaintiffs have developed asbestos-related lung disease and other related physical conditions and diseases. Plaintiffs have been damaged in the following particulars:

(a) Plaintiffs have suffered great physical pain and mental anguish and will continue to suffer great pain of body and mind throughout their lifetimes;

(b) Plaintiffs have incurred hospital and/or medical and/or pharmaceutical and/or other expenses and will continue to incur such expenses in the future due to the progressively disabling character of asbestos-related lung disease and other

related physical conditions and diseases from which they now suffer and will continue to suffer in the future;

(c) Plaintiffs suffer a physical impairment at this time and will continue to suffer this impairment in the future due to the disabling character of asbestos-related lung disease and other related physical conditions and diseases;

(d) Plaintiffs suffer a permanent partial disability at this time and will become permanently and totally disabled in the future due to the progressive character of asbestos-related lung disease and other related physical conditions and diseases;

(e) Plaintiffs are subject to an extraordinarily increased likelihood of developing (or the progression and/or recurrence of) cancer of the lungs, mesothelioma and other cancers, all due to said exposure to products and/or machinery manufactured, sold and/or distributed by the named Defendants;

(f) Plaintiffs will require medical monitoring throughout their lifetimes to survey the progression of their asbestos-related lung disease and to aid in the early detection and treatment of any or all of the cancers described above and will be required to pay for such medical monitoring;

(g) Plaintiffs have suffered a progressive loss of earning capacity and will continue to suffer a loss of earning capacity and wages throughout their lifetimes;

(h) Plaintiffs require or will require domestic help and nursing care due to their disabilities and have been or will be required to pay for such domestic help and nursing services;

(i) Prior to the onset of their symptoms, Plaintiffs were extremely active and participated in numerous hobbies and activities, and as a result of their illness, Plaintiffs have been and will be prevented from engaging in some of said activities which were normal to them prior to developing symptoms from asbestos-related lung disease. Plaintiffs have been and will otherwise be prevented from participating in and enjoying the benefits of a full and complete life; and

(j) Plaintiffs seek punitive and exemplary damages. Specifically, each Plaintiff seeks a maximum recovery of Fifteen (15) Million Dollars in compensatory damages and a maximum recovery of Fifteen (15) Million Dollars in punitive damages against each Defendant named herein.

90. The conduct of Defendants, as alleged hereinabove, was a direct, proximate and producing cause of the damages resulting form the asbestos-related lung diseases and wrongful deaths of Plaintiffs' decedents, and of the following general and special damages including but not limited to, damages for survival and wrongful death claims, that Plaintiffs have sustained both in their individual capacities and as personal representatives of the heirs and estates of Plaintiffs' decedents:

(a) The full value of the life of Plaintiffs' decedents;

(b) The conscious physical pain and suffering and mental anguish sustained by Plaintiffs' decedents prior to their deaths;

(c) The disabilities and physical impairments suffered by Plaintiffs' decedents prior to their deaths;

(d) The disfigurement suffered by Plaintiffs' decedents prior to their deaths;

(e) Reasonable and necessary hospital and/or medical and/or pharmaceutical and/or other necessary expenses incurred by Plaintiffs' decedents and their estates;

(f) Reasonable funeral and burial expenses incurred by Plaintiffs' decedents' estates;

(g) Decedents' lost earnings and net accumulations;

(h) The loss of the care, maintenance, services, support, advice, counsel and consortium which Plaintiffs and the decedents' family members received from the decedents prior to their last illnesses and deaths;

(i) Decedents' mental anguish caused by their extraordinary increased likelihood during their lifetimes of developing asbestos-related cancer of the lungs, mesothelioma and other cancers, due to said exposure to products manufactured, sold and/or distributed by the named Defendants;

(j) The mental anguish suffered by Plaintiffs and decedents' family members as a consequence of observing the last illness and death of their family members;

(k) Plaintiffs seek punitive and exemplary damages. Specifically, Plaintiffs seek a maximum recovery of Fifteen (15) Million Dollars in compensatory damages and maximum recovery of Fifteen (15) Million Dollars in punitive damages against each Defendant named herein.

91. Plaintiffs filed suit within two (2) years of the date of discovering their or Plaintiffs' decedents asbestos-

related conditions or the existence of any asbestos-related causes of action.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against the Defendants, and each of them, jointly and severally, for general damages, special damages, for punitive and exemplary damages, for their costs expended herein, for prejudgment interest from the date of Plaintiffs' or Plaintiffs' decedents exposure to asbestos-containing insulation products and/or machinery calling for the use of asbestos-containing products, and post judgment interest on the judgment at the rate allowed by law, and for such other and further relief, both at law and in equity, to which Plaintiffs may show themselves justly entitled. Each Plaintiff seeks recovery for their damages in an amount to be determined by the jury in the exercise of its enlightened conscience, but in no event less than Fifty (50) Thousand Dollars.

Respectfully submitted,

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A PROFESSIONAL CORPORATION
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Dallas, Texas 75219
(214) 521-3605
FAX: (214) 520-1181

By: /s/ _____ for MES
Mary E. Skelnik
Texas State Bar
No. 18455660

AND
DOFFERMYRE, SHIELDS,
CANFIELD, KNOWLES
& DEVINE
Suite 1600
1355 Peachtree Street
Atlanta, Georgia 30309

By: /s/ _____
Kenneth S. Canfield
Georgia State Bar No. 10774

Attorneys for Plaintiffs

JURY DEMAND

Plaintiffs demand that all issues of fact in this case be tried to a properly impanelled jury.

EXHIBIT "A"

Isaiah Jones, Jr., Deceased
Cleo Jones, Representative
2117 6th Place West
Birmingham, AL 35204

Annie Kirksey Patton, Deceased
Evelyn V. Patton, Representative
133 N. Atmore Avenue
Mobile, AL 36612

Claude Morris Pike
567 Dial Road
Blountville, AL 35031

Clayton Lewis Hall
888 Freeman Road
Danville, AL 35619

Nebraska Greer
Rt. 4, Box 344
Rogersville, AL 35652

Ray Hardin Hollingsworth
9530-d Stone Road
Semmes, AL 36575

Sim Coats
652 Marmotte Street, Apt. B
Mobile, AL 36603

Ruben Edward Robinson, Sr. and
Chrysobel Robinson
1419 Cedar Park Drive
Mobile, AL 36605

George Washington Raye
2211 N. Mulberry
Butler, AL 36904

Garland Edward Woods
2811 Mudd Creek Road
Adger, AL 35006

Barbara Ann Hoffman and
Frederick Hoffman
2145 Tabor Court
Germantown, TN 38139

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

CLEO JONES, Individually and as Personal Representative of the Heirs and Estate of ISAIAH JONES, JR., Deceased; EVELYN V. PATTON, Individually and as Personal Representative of the Heirs and Estate of ANNIE KIRKSEY PATTON, Deceased; CLAUDE MORRIS PIKE; CLAYTON LEWIS HALL; NEBRASKA GREER; RAY HARDIN HOLLINGSWORTH; SIM COATS; RUBEN EDWARD ROBINSON, SR. and CHRYSOBEL ROBINSON; GARLAND EDWARD WOODS; and GEORGE WASHINGTON RAYE; and BARBARA ANN HOFFMAN and FREDERICK HOFFMAN,

Plaintiffs,

VS.

GEORGIA PACIFIC CORPORATION (successor to BESTWALL GYPSUM COMPANY); THE ANCHOR PACKING COMPANY; AQUA-CHEM, INC. (d/b/a CLEAVER-BROOKS DIVISION); ASTEN INC.;

CIVIL ACTION

FILE NO.___

COMBUSTION ENGINEERING,)
INC.; CROWN CORK AND)
SEAL COMPANY, INC. (successor)
to MUNDET CORK COMPANY))
THE FLINTKOTE COMPANY;)
FOSTER WHEELER ENERGY)
CORPORATION; GARLOCK)
INC.; GENERAL ELECTRIC)
COMPANY; GREFCO, INC.;)
HARBISON-WALKER)
REFRACTORIES COMPANY)
(formerly a division of)
INDRESCO INC.); INDRESCO)
INC. (successor to HARBISON-)
WALKER REFRACTORIES)
COMPANY, a division of)
INDRESCO, INC.); KELLY-)
MOORE PAINT COMPANY,)
INC.; METROPOLITAN LIFE)
INSURANCE COMPANY;)
MINNESOTA)
MINING AND)
MANUFACTURING COMPANY)
(a/k/a "3M");)
NORTH AMERICAN)
REFRACTORIES COMPANY;)
OWENS-CORNING, f/k/a)
OWENS-CORNING FIBERGLAS)
CORPORATION (d/b/a OWENS)
CORNING CORPORATION);)
PITTSBURGH CORNING)
CORPORATION (successor to)
UNARCO INDUSTRIES, INC.))
PROKO INDUSTRIES, INC.;)
SYNKOLOID, A DIVISION OF)

MURALO CO. INC.; UNIROYAL HOLDING, INC. (successor to U.S. RUBBER COMPANY); U.S. MINERAL PRODUCTS COMPANY; W. R. GRACE & CO.-CONN. (successor to W.R. GRACE & COMPANY); A.P. GREEN INDUSTRIES, INC. (f/k/a A.P. GREEN REFRACTORIES COMPANY, a subsidiary of U.S. GYPSUM COMPANY); ARMSTRONG WORLD INDUSTRIES, INC. (successor to ARMSTRONG CORK COMPANY); ASBESTOS CLAIMS MANAGEMENT CORPORATION (c/o NEW NATIONAL GYPSUM COMPANY); CERTAINTEED CORPORATION; DANA CORPORATION; GAF CORPORATION (successor to RUBEROID CORPORATION); GASKET HOLDING, INC., f/k/a FLEXITALLIC INC. (successor to FLEXITALLIC GASKET COMPANY); QUIGLEY COMPANY, INC.; U.S. GYPSUM COMPANY; ALLIED-SIGNAL, INC. (successor to THE BENDIX CORPORATION); BORG-WARNER CORPORATION; CHRYSLER CORPORATION; FORD MOTOR COMPANY; GENERAL MOTORS CORPORATION;

PNEUMO ABEX CORPORATION (successor to ABEX CORPORATION) and AMERICAN BRAKE SHOE CO.); MOOG AUTOMOTIVE INC., (successor to WAGNER ELECTRIC CORPORATION); THE MAREMONT CORPORATION (a subsidiary of ARVIN INDUSTRIES, INC. and successor to GRIZZLY MANUFACTURING CO.); USX CORPORATION; and JOHN DOES I through 5, who are individuals, proprietorships, corporations or other entities whose names and identities are otherwise unknown to Plaintiffs,

Defendants.

NOTICE OF REMOVAL

Defendant General Motors Corporation hereby gives notice of removal of Case No. E-65092 from the Superior Court of Fulton County, State of Georgia. In support thereof, defendant states as follows:

INTRODUCTION

I.

This case was filed in November of 1997 in the Superior Court of Fulton County. While all thirteen plaintiffs are residents of Alabama and all defendants are residents of other states, the case did not appear removable on diversity grounds because one of the 42 defendants

named – defendant Georgia-Pacific Corporation – is a Georgia resident. *See* 28 U.S.C. § 1441(b) (a diversity case is removable only if none of the properly joined defendants is a resident of the forum state). Thirty days ago, however, defendants received discovery responses in this case showing that plaintiffs were unable to specify any claim against Georgia-Pacific, and that Georgia-Pacific's joinder to this case at the outset was fraudulent. The case is now removable as complete diversity otherwise exists.

2.

Specifically, on February 7, 1998, defendants received Interrogatory Answers in this case in which, despite a direct request for factual support, plaintiffs failed to set forth any basis for a claim by any plaintiff against Georgia-Pacific. *See Anderson v. Worldwide Church of God*, 661 F. Supp. 1401, 1402-03 (D. Minn. 1987) (denying plaintiffs' motion for remand because answers to interrogatories confirmed that plaintiffs had no colorable claim against non-diverse defendants).

3.

This case represents the efforts of thirteen plaintiffs with various different individual asbestos claims against varying subsets of 42 defendants (whose products range from drywall compound to automobile brakes) to band together in a single case. Defendants challenge whether thirteen claims that arise out of different transactions and occurrences can be joined together in a single case, but that issue will be placed before the Court following this removal and the disposition of any motions to remand.

For now, defendants remove the action for the reasons referenced above and set forth in detail below.

DIVERSITY JURISDICTION EXISTS

4.

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1332 as all plaintiffs are of diverse citizenship from all defendants and the amount in controversy exceeds $75,000.00 per person.

5.

All thirteen plaintiffs are of diverse citizenship from all 42 defendants. Upon information and belief, eleven of the plaintiffs are citizens of Alabama and two plaintiffs are citizens of Tennessee.

6.

Defendant The Anchor Packing Company, is incorporated in Delaware and has its principal place of business in New York.

7.

Defendant Aqua-Chem, Inc. is incorporated in Delaware and has its principal place of business in Wisconsin.

8.

Defendant Asten, Inc. is incorporated in Delaware and has its principal place of business in South Carolina.

9.

Defendant Combustion Engineering, Inc. is incorporated in Delaware and has its principal place of business in Connecticut.

10.

Defendant Crown Cork and Seal Company, Inc. is incorporated and has its principal place of business in Pennsylvania.

11.

Defendant The Flintkote Company is incorporated in Delaware and has its principal place of business in California.

12.

Defendant Foster Wheeler Energy Corporation is incorporated in Delaware and has its principal place of business in New Jersey.

13.

Defendant Garlock Inc. is incorporated in Ohio and has its principal place of business in North Carolina.

14.

Defendant General Electric Company is incorporated and has its principal place of business in New York.

15.

Defendant Grefco, Inc. is incorporated in Delaware and has its principal place of business in California.

16.

Defendant Harbison-Walker Refractories Company is incorporated in Delaware and has its principal place of business in Pennsylvania.

17.

Defendant Indresco Inc. is incorporated in Delaware and has its principal place of business in Pennsylvania.

18.

Defendant Kelly-Moore Paint Company Inc. is incorporated and has its principal place of business in California.

19.

Defendant Metropolitan Life Insurance Company is incorporated and has its principal place of business in New York.

20.

Defendant Minnesota Mining and Manufacturing Company is incorporated in Delaware and has its principal place of business in Minnesota.

21.

Defendant North American Refractories Company is incorporated and has its principal place of business in Ohio.

22.

Defendant Owens-Corning is incorporated in Delaware and has its principal place of business in Ohio.

23.

Defendant Pittsburgh Corning is incorporated and has its principal place of business in Pennsylvania.

24.

Defendant Proko Industries, Inc. is incorporated and has its principal place of business in Texas.

25.

Defendant Synkoloid, is incorporated and has its principal place of business in New Jersey.

26.

Defendant Uniroyal Holding, Inc. is incorporated in New Jersey and has its principal place of business in Connecticut.

27.

Defendant U.S. Mineral Products Company is incorporated and has its principal place of business in New Jersey.

28.

Defendant W. R. Grace & Co.-Conn. is incorporated in Connecticut and has its principal place of business in Florida.

29.

Defendant A. P. Green Industries, Inc. is incorporated in Delaware and has its principal place of business in Missouri.

30.

Defendant Armstrong World Industries, Inc. is incorporated and has its principal place of business in Pennsylvania.

31.

Defendant Asbestos Claims Management Corporation is incorporated in Delaware and has its principal place of business in North Carolina.

32.

Defendant Certainteed Corporation is incorporated in Delaware and has its principal place of business in Pennsylvania.

33.

Defendant Dana Corporation is incorporated in Virginia and has its principal place of business in Ohio.

34.

Defendant GAF Corporation is incorporated in Delaware and has its principal place of business in New Jersey.

35.

Defendant Gasket Holding, Inc., f/k/a Flexitallic, Inc. is incorporated in Delaware and has its principal place of business in Michigan.

36.

Defendant Quigley Company, Inc. is incorporated and has its principal place of business in New York.

37.

Defendant U.S. Gypsum Company is incorporated in Delaware and has its principal place of business in Illinois.

38.

Defendant Allied-Signal, Inc. is incorporated in Delaware and has its principal of business in New Jersey.

39.

Defendant Borg-Warner Corporation is incorporated in Delaware and has its principal place of business in Michigan.

40.

Defendant Chrysler Corporation is incorporated in Delaware and has its principal place of business in Michigan.

41.

Defendant Ford Motor Company is incorporated in Delaware and has its principal place of business in Michigan.

42.

Defendant General Motors Corporation is incorporated in Delaware and has its principal place of business in Michigan.

43.

Defendant Pneumo Abex Corporation is incorporated in Delaware and has its principal place of business in New York.

44.

Defendant Moog Automotive, Inc. is incorporated in Missouri and has its principal place of business in Texas.

45.

Defendant the Maremont Corporation is incorporated in Delaware and has its principal place of business in Indiana.

46.

Defendant USX Corporation is incorporated and has its principal place of business in Pennsylvania.

47.

The amount in controversy exceeds $75,000.00 per plaintiff. Each of the thirteen plaintiffs seeks a maximum recovery of $15,000,000 in compensatory damages and $15,000,000 in punitive damages against each defendant named in the Complaint.

GEORGIA-PACIFIC CORPORATION HAS BEEN FRAUDULENTLY JOINED

48.

The presence of Georgia-Pacific Corporation as a defendant prevented removal on diversity grounds on the face of the Complaint. The Complaint did not, however, specify the factual basis of any of the claims against Georgia-Pacific on behalf of any plaintiff. Defendant General Motors recognized that if there was no existing factual basis, Georgia-Pacific had been improperly joined and the case could be removed. Defendant General Motors therefore prepared a set of interrogatories to test whether plaintiffs could specify an actual factual basis for a claim against Georgia-Pacific. Specifically, General Motors asked plaintiff to specify the basis for the claims of one of the plaintiffs against Georgia-Pacific. *See* Defendant General Motors' First Set of Interrogatories to Plaintiff Claude Morris Pike (attached hereto in Exhibit A). Plaintiffs response failed to state any basis for a claim by that plaintiff or any other plaintiff against Georgia-Pacific.

49.

Plaintiff's Answers to Defendant's Interrogatories fail to provide any factual substantiation whatsoever for any plaintiff's purported claims against Georgia-Pacific. (A copy of the Answers is attached hereto in Exhibit A). The response to each of the numbered interrogatories is identical and states as follows:

> Plaintiff objects to this interrogatory as it is unduly burdensome, harassing and repetitive

since it seeks information which has already been provided in the original complaint. Consequently, Defendant's discovery seeks to engender unnecessary and added costs to this litigation by asking plaintiff to produce information previously provided. Without waiving these objections, please see the original complaint and any supplements and/or amendments thereto. All the named plaintiffs in this suit are bringing claims against Georgia-Pacific Corporation. Investigation into this case is still continuing. Last, please see Plaintiff's deposition testimony given or to be given in this case as well as all of Plaintiff's discovery and supplemental discovery responses filed or to be filed in this case.

50.

Plaintiffs represented by the same counsel in three other cases have filed the same exact response in those three other cases (also being removed today), demonstrating the lack of any present ability to state a factual claim against Georgia-Pacific.

51.

While asserting that "[a]ll the named plaintiffs in this suit are bringing claims against Georgia-Pacific Corporation," these Answers fail to provide a single fact supporting the existence of a cause of action by even one plaintiff. The Answers direct Defendant back to the nonexistent factual allegations of the Complaint and refer to depositions yet to be taken and supplemental discovery responses allegedly to be filed in the future.

52.

Plaintiffs response to Defendant's Interrogatories establishes that plaintiffs have no basis for asserting a claim against Georgia-Pacific. The joinder of Georgia-Pacific as a defendant in this action is therefore fraudulent. *See Anderson,* 661 F. Supp. at 1402-03 (finding fraudulent joinder and denying motion for remand based on answers to interrogatories which established that plaintiffs had no claim against non-diverse defendant). The citizenship of Georgia-Pacific is therefore to be disregarded, and this case is removable.

REMOVAL IS PROCEDURALLY PROPER

53.

Removal of this case is timely because this notice of removal has been filed within 30 days after receipt by the defendant of plaintiffs' answers to interrogatories. *See* 28 U.S.C. § 1446(b) (stating that, "[i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or *other paper* from which it may be first ascertained that the case is one which is or has become removable."). *See also Chapman v. Powermatic Inc.,* 969 F.2d 160, 164 (5th Cir. 1992) (stating that, "[c]learly the answer to interrogatory which triggered the filing of the notice of removal in this case is such an 'other paper' " and holding that case became removable based on answer to interrogatory); *Webster v. Dow United Technologies Composite Products, Inc.,* 925 F. Supp. 727, 728

(M.D. Ala. 1996) (finding that answer to interrogatory triggered thirty-day time period).

54.

All defendants have consented to the filing of this Notice of Removal. Copies of each written Consent to Removal are attached herewith in Exhibit B.

55.

Copies of all "processes, pleadings, and orders served upon defendants" in this action have been attached to this Notice of Removal as required by 28 U.S.C. § 1446(a).[1]

56.

Pursuant to 28 U.S.C. § 1446(d), written notice of the filing of this Notice of Removal is being given to the plaintiff, and a copy of this Notice of Removal is being filed with the Clerk of the Superior Court of Fulton County.

57.

Defendant reserves the right to amend or supplement this Notice of Removal.

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[1] Defendant has attached all "processes, pleadings, and orders" on file with the Clerk of the Superior Court of Fulton County as of March 4, 1998.

58.

Defendant requests a trial by jury on all issues.

WHEREFORE, this Court has jurisdiction pursuant to 28 U.S.C. § 1332(a), and removal pursuant to U.S.C. § 1441 is appropriate.

This 9th day of March, 1998.

KING & SPALDING

/s/ Stephen B. Devereaux
Richard A. Schneider
Georgia Bar No. 629569
Stephen B. Devereaux
Georgia Bar No. 219791
Shannon F. Cox
Georgia Bar No. 192661

191 Peachtree Street
Atlanta, Georgia 30303-1763
(404) 572-4600

Attorneys for Defendant
General Motors Corporation

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CLEO JONES, Individually and as Personal Representative of the Heirs and Estate of ISAIAH JONES, JR., Deceased; EVELYN V. PATTON, Individually and as Personal Representative of the Heirs and Estate of ANNIE KIRKSEY PATTON, Deceased; CLAUDE MORRIS PIKE; CLAYTON LEWIS HALL; NEBRASKA GREER; RAY HARDIN HOLLINGSWORTH; SIM COATS; RUBEN EDWARD ROBINSON, SR. and CHRYSOBEL ROBINSON; GARLAND EDWARD WOODS; GEORGE WASHINGTON RAYE; and BARBARA ANN HOFFMAN and FREDERICK HOFFMAN,	§	CIVIL ACTION
Plaintiffs,	§	FILE NO. E-65092
VS.	§	
GEORGIA PACIFIC CORPORATION, et al.,	§	
Defendants.	§	

PLAINTIFF'S ANSWERS TO DEFENDANT GENERAL MOTORS CORPORATION'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

TO: DEFENDANT, GENERAL MOTORS CORPORATION, by and through its counsel of record, Stephen B. Devereaux, King & Spalding, 191 Peachtree Street, Atlanta, Georgia 30303-1763.

COMES NOW, CLAUDE MORRIS PIKE, Plaintiff herein and by and through his counsel of record, files this his Answers to First Set of Interrogatories and Request for Production of Documents propounded by Defendant General Motors Corporation pursuant to the Texas Rules of Civil Procedure.

Respectfully submitted,

BARON & BUDD
A PROFESSIONAL CORPORATION
3102 Oak Lawn Avenue, Suite 1100
Dallas, Texas 75219
(214) 521-3605
(214) 520-1181 (Fax)

By: /s/ Mary E. Skelnik
MARY E. SKELNIK
STATE BAR NO. 18455660
JUDY BRADSHAW
STATE BAR NO. 02837100

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 1:

State whether Plaintiff Claude Morris Pike alleges any claim or cause of action in this case against defendant Georgia-Pacific Corporation.

ANSWER: Plaintiff objects to this interrogatory as it is unduly burdensome, harassing and repetitive since it seeks information which has already been provided in the original complaint. Consequently, Defendant's discovery seeks to engender unnecessary and added costs to this litigation by asking plaintiff to produce information previously provided. Without waiving these objections, please see the original complaint and any supplements and/or amendments thereto. All the named plaintiffs in this suit are bringing claims against Georgia-Pacific Corporation. Investigation into this case is still continuing. Last, please see Plaintiff's deposition testimony given or to be given in this case as well as all of Plaintiff's discovery and supplemental discovery responses filed or to be filed in this case.

INTERROGATORY NO. 2:

If the answer to Interrogatory Number 1 is yes,

a. identify the exact claim(s) or cause(s) of action alleged; and

b. state in detail all facts which allegedly support each claim by Mr. Pike against Georgia-Pacific Corporation, including identifying with specificity and dates any products to which plaintiff was exposed to which Georgia-Pacific Corporation is allegedly responsible, and all statements or omissions of Georgia-Pacific Corporation (including precise time, place and content) claimed to have harmed Plaintiff Pike.

ANSWER: Plaintiff objects to this interrogatory as it is unduly burdensome, harassing and repetitive since it seeks information which has already been provided in the original complaint. Consequently, Defendant's discovery seeks to engender unnecessary and added costs to this litigation by asking plaintiff to produce information previously provided. Further, this interrogatory is premature because Plaintiff has not had an ample opportunity to pursue discovery in this case. Without waiving these objections, please see the original complaint and any supplements and/or amendments thereto. All the named plaintiffs in this suit are bringing claims against Georgia-Pacific Corporation. Investigation into this case is still continuing. Last, please see Plaintiff's deposition testimony given or to be given in this case as well as all of Plaintiff's discovery and supplemental discovery responses filed or to be filed in this case.

INTERROGATORY NO. 3:

State the name of each defendant against which Mr. Pike alleges any claim or cause of action.

ANSWER: Plaintiff objects to this interrogatory as it is unduly burdensome, harassing and repetitive since it seeks information which has already been provided in the original complaint. Consequently, Defendant's discovery seeks to engender unnecessary and added costs to this litigation by asking plaintiff to produce information previously provided. Further, this interrogatory is premature because Plaintiff has not had an ample opportunity to pursue discovery in this case.

Without waiving these objections, please see the original complaint and any supplements and/or amendments thereto. All the named plaintiffs in this suit are bringing claims against all Defendant's named in the original complaint as outlined by the complaint. Investigation into this case is still continuing. Last, please see Plaintiff's deposition testimony given or to be given in this case as well as all of Plaintiff's discovery and supplemental discovery responses filed or to be filed in this case.

RESPONSES TO REQUEST FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

All documents identified by Plaintiff Claude Morris Pike in response to Defendant's first interrogatories.

RESPONSE: Plaintiff objects to this interrogatory as it is unduly burdensome, harassing and repetitive since it seeks information which has already been provided in the original complaint. Consequently, Defendant's discovery seeks to engender unnecessary and added costs to this litigation by asking plaintiff to produce information previously provided. Further, this interrogatory is premature because Plaintiff has not had an ample opportunity to pursue discovery in this case. Without waiving these objections, please see the original complaint and any supplements and/or amendments thereto. Investigation into this case is still continuing. Last, please see Plaintiff's deposition testimony given or to be given in this case as well as all of Plaintiff's discovery and

supplemental discovery responses filed or to be filed in this case.

REQUEST FOR PRODUCTION NO. 2:

All documents consulted, referred to, or otherwise utilized in any way in connection with the preparation of Plaintiff Claude Morris Pike's responses to Defendant's first interrogatories.

RESPONSE: Plaintiff objects to this interrogatory as it is unduly burdensome, harassing and repetitive since it seeks information which has already been provided in the original complaint. Consequently, Defendant's discovery seeks to engender unnecessary and added costs to this litigation by asking plaintiff to produce information previously provided. Further, this interrogatory is premature because Plaintiff has not had an ample opportunity to pursue discovery in this case. Without waiving these objections, please see the original complaint and any supplements and/or amendments thereto. Investigation into this case is still continuing. Last, please see Plaintiff's deposition testimony given or to be given in this case as well as all of Plaintiff's discovery and supplemental discovery responses filed or to be filed in this case.

REQUEST FOR PRODUCTION NO. 3:

All documents that substantiate, refer or relate to the answers provided by Mr. Pike to Defendant's first interrogatories.

RESPONSE: Plaintiff objects to this interrogatory as it is unduly burdensome, harassing and repetitive since it seeks information which has

already been provided in the original complaint. Consequently, Defendant's discovery seeks to engender unnecessary and added costs to this litigation by asking plaintiff to produce information previously provided. Further, this interrogatory is premature because Plaintiff has not had an ample opportunity to pursue discovery in this case. Without waiving these objections, please see the original complaint and any supplements and/or amendments thereto. Investigation into this case is still continuing continuing. Last, please see Plaintiff's deposition testimony given or to be given in this case as well as all of Plaintiff's discovery and supplemental discovery responses filed or to be filed in this case.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

CLEO JONES, Individually and as Personal Representative of the Heirs and Estate of ISAIAH JONES, JR., Deceased, ET AL.,	§	CIVIL ACTION FILE NO. 98-CV-745-RLV
Plaintiffs,	§	
VS.	§	
GEORGIA PACIFIC CORPORATION (successor to BESTWALL GYPSUM COMPANY), ET AL.; Defendants.	§	

PLAINTIFFS' EMERGENCY MOTION FOR REMAND

COME NOW plaintiffs herein, and, pursuant to 28 U.S.C. § 1447, respectfully move the Court for an order remanding this case to the Superior Court of Fulton County, State of Georgia, from which the case was removed by defendant General Motors Corporation on or about March 9, 1998. As plaintiffs demonstrate in the attached memorandum, 28 U.S.C. § 1441(b) precludes removal, because one of the defendants, Georgia-Pacific Corporation, is a citizen of the State of Georgia, and that defendant was not "fraudulently joined" in the litigation.

Plaintiffs' ask the Court, in its order remanding the case, to award them just costs and actual expenses, including attorney fees, that they incurred as a result of the improper removal.

Plaintiffs' also ask the Court to decide this motion on an expedited basis, because GM is attempting to effect transfer of this action to the Eastern District of Pennsylvania, where a nationwide multidistrict consolidation of federal asbestos litigation is pending. As plaintiffs demonstrate in the attached memorandum, this is *not* a federal case. The Court should order remand forthwith.

In further support of this motion, plaintiffs would refer the Court to the Memorandum in Support of Emergency Motion for Remand, which plaintiffs attach and incorporate by reference.

Respectfully submitted,
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FAX: (214) 520-1181
By: /s/ Brent M. Rosenthal
Brent M. Rosenthal
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AND

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By: /s/ Kenneth S. Canfield
Kenneth S. Canfield
Georgia State Bar No. 10774

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

CLEO JONES, Individually and as Personal Representative of the Heirs and Estate of ISAIAH JONES, JR., Deceased, ET AL.,	§	CIVIL ACTION
Plaintiffs,	§	FILE NO. 98-CV-745
VS.	§	
GEORGIA PACIFIC CORPORATION (successor to BESTWALL GYPSUM COMPANY), ET AL.;	§	
Defendants.	§	

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR REMAND

I. INTRODUCTION

This is a products liability case in which the 13 plaintiffs allege that they or their decedents sustained physical injuries as a result of their exposure to asbestos-containing products. Plaintiffs filed their original complaint in Fulton County, Georgia, naming 39 companies as defendants and alleging that each defendant is liable for their injuries under theories of strict liability in tort, negligence, concert of action, and civil conspiracy, among others.

Defendant General Motors Corporation ("GM") has removed the case to this Court. GM concedes that the case as pled in the original complaint is not removable,

because the complaint names as a defendant Georgia-Pacific Corporation, a Georgia citizen for purposes of the removal statute (28 U.S.C. § 1441(b)). GM contends, however, that interrogatory answers recently served by plaintiffs on GM "fail to provide any factual substantiation whatsoever for any plaintiff's purported claims against Georgia-Pacific" and therefore establish that the joinder of Georgia-Pacific in this case was fraudulent and must be disregarded in determining GM's right to removal. GM Notice of Removal at 13-14.

GM's removal of this action is improper on its face. To remove a case based on the fraudulent joinder of a local defendant, it is not enough to show that the plaintiff's most recent discovery responses "fail to provide any factual substantiation" for the claims alleged against Georgia-Pacific; rather, GM was obligated to show either that plaintiffs have "no possibility" of maintaining their claims against Georgia-Pacific or that plaintiffs "fraudulently pled jurisdictional facts" to bring Georgia-Pacific into state court. *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997). The answers to interrogatories cited as the basis for removal do not even come close to making either showing. This case should be remanded immediately, with costs, expenses, and attorneys fees assessed against GM for the improvident removal under 28 U.S.C. § 1447(c).

II. THE LEGAL STANDARD FOR REMOVAL BASED ON FRAUDULENT JOINDER

In its most recent case on the subject, the Eleventh Circuit described the heavy burden that a removing party

must carry to support an allegation that a local defendant was fraudulently joined by a plaintiff to destroy removability:

> In a removal case alleging fraudulent joinder, the removing party has the burden of proving that either: (1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court.

Crowe, 113 F.3d at 1538, citing *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989). "In the remand context, the district court's authority to look into the ultimate merit of the plaintiff's claims must be limited to checking for obviously fraudulent or frivolous claims." *Crowe*, 113 F.3d at 1542. Thus, when considering a motion for remand, federal courts "are not to weigh the merits of a plaintiff's claim before determining whether it is an arguable one under state law," but must "resolve any uncertainties about state substantive law in favor of the plaintiff." *Id.* at 1538. "If there is *even a possibility* that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court." *Id.* (emphasis added), *quoting Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1440-41 (11th Cir. 1983). Recognizing that "the proceeding appropriate for resolving a claim of fraudulent joinder is similar to that used for ruling on a motion for summary judgment under Fed. R. Civ. P. 56(b)," 113 F.3d at 1538, the court emphasized that deciding a claim of fraudulent

joinder requires even more deference to the plaintiff's claims:

> For a plaintiff to present an arguable claim against an in-state defendant and, therefore, to require a case removed to federal court to be remanded to state court, the plaintiff need not show that he could survive in the district court a motion for summary judgment filed by that in-state defendant. For a remand, the plaintiff's burden is much lighter than that: after drawing all reasonable inferences from the record in the plaintiff's favor and then resolving all contested issues of fact in favor of the plaintiff, there need only be "a reasonable basis for predicting that the state law *might* impose liability on the facts involved."

Crowe, 113 F.3d at 1541-42 (emphasis added), quoting *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 550 (5th Cir. Unit A 1981).

Thus, in order to support removal under the latest Eleventh Circuit precedent, unless the Court – drawing all factual inferences and resolving all ambiguities in the law in plaintiffs' favor – can find "no possibility" that plaintiffs can prevail in their claims against Georgia-Pacific, this case must be remanded to state court.

III. GM CANNOT CARRY ITS HEAVY BURDEN OF PROVING THAT PLAINTIFFS FRAUDULENTLY JOINED GEORGIA-PACIFIC.

A. The Answers to Interrogatories Do Not Demonstrate "That There Is No Possibility the Plaintiff Can Establish a Cause of Action" Against Georgia-Pacific Under Traditional Product Liability Theories.

In their original complaint, plaintiffs specifically allege that either they or their decedents "have suffered injuries and/or death proximately caused by their exposure to asbestos-containing products designed, manufactured, or sold by Defendants." Plaintiffs' Original Asbestos Complaint and Jury Demand, ¶ 45, at 18. Plaintiffs alleged further that defendants were negligent in marketing their asbestos-containing products, and that the products were defective and not merchantable. *Id.*, ¶¶ 48, 54. As the Eleventh Circuit noted in *Crowe*, "[w]hen multiple defendants are named in a complaint, the allegations can be and usually are to be read in such a way that each defendant is having the allegation made about him individually." 113 F.3d 1539. Thus, by alleging that they or their decedents were exposed to defective asbestos-containing products made and sold by defendants, plaintiffs have effectively stated a viable claim under the applicable law of products liability against Georgia-Pacific.

GM complains, however, that because plaintiffs' answers to GM's interrogatories do not provide specific factual support for plaintiffs' claims against Georgia-Pacific, the answers "establish[] that plaintiffs have no basis for asserting a claim against Georgia-Pacific. This

argument is meritless. The answers to interrogatories do not abandon plaintiffs' products liability claims against Georgia-Pacific; on the contrary, the answer cited by GM expressly refers to the allegations in the original complaint, reaffirms that "[a]ll the named plaintiffs in this suit are bringing claims against Georgia-Pacific;" and advises that "[i]nvestigation into this case is still continuing." Neither GM nor any other defendant has moved to compel more complete answers to the interrogatories. While plaintiffs' answers to interrogatories may not be as informative as GM would like, they do not conceivably negate the possibility that plaintiffs will recover against Georgia-Pacific under traditional product liability law, and therefore does not conceivably support removal.

GM cites *Anderson v. Worldwide Church of God*, 661 F. Supp. 1401 (D. Minn. 1987) for the proposition that a federal district court may predicate a finding of fraudulent joinder on answers to interrogatories that do not establish a claim against the local defendant. But in *Anderson*, the body of plaintiff's *complaint* did not assert a claim against the local defendants. *Id.* at 1402. The answers to interrogatories, and the oral arguments of plaintiffs' counsel, merely "confirmed" that plaintiffs had no colorable claim against the local defendants. *Id.* That is a far cry from the situation here, in which the plaintiffs' original complaint unquestionably states a products liability claim against the local defendant, and the answers to interrogatories reaffirm the plaintiffs' intention to establish such a claim.

This case is barely four months old. The state court has yet to enter an scheduling order. Plaintiffs have not yet completed and served their comprehensive list of

employers, jobsites, and products to which they were exposed, as is customary in virtually every jurisdiction in the country. Both the federal and the Georgia summary judgment rules afford plaintiffs a reasonable amount of time to develop, through investigation and discovery of the defendants, evidence supporting the allegations in their complaint. *See Jones v. City of Columbus, Georgia*, 120 F.3d 248, 253 (11th Cir. 1997) ("The law in this circuit is clear: the party opposing a motion for summary judgment should be permitted an adequate time to complete discovery prior to consideration of the motion."); *Shipley v. Handicaps Mobility Systems, Inc.*, 473 S.E.2d 533, 534 (Ga. Ct. App. 1996) (directing that ruling on motion for summary judgment "wait until after Shipley's right to discovery is complete"); *see also* Ga. Code Ann. § 9-11-56(f) (allowing party opposing motion for summary judgment to obtain continuance for the purpose of conducting discovery); *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (interpreting identical provision in Federal Rules to require "that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition"). Thus, it is inconceivable that plaintiffs' answers to interrogatories, which note the need for additional investigation and discovery, provide the basis for a colorable motion for summary judgment by Georgia-Pacific in federal *or* state court on plaintiffs' products liability theory. A fortiori, as *Crowe* makes clear, the record does not permit a finding that plaintiffs fraudulently joined Georgia-Pacific in this litigation.

B. Plaintiffs Have Alleged Viable Civil Conspiracy Claims Against Georgia-Pacific, Which Are Not Negated by Inability To Show Exposure to Georgia-Pacific's Asbestos-Containing Products.

In addition to plaintiffs' products liability theories, plaintiffs also allege that all defendants, including Georgia-Pacific, caused plaintiffs' injuries by engaging in one or more conspiracies to withhold from the consuming public information concerning the dangers associated with the use of and exposure to asbestos-containing products. *See generally* Plaintiffs' Original Asbestos Complaint, Count Three, ¶¶ 67-72. Under this theory, Georgia-Pacific is liable for damages caused by plaintiffs' (or their decedents') exposure to asbestos even without proof of exposure to an asbestos-containing product made or sold by Georgia-Pacific. Other jurisdictions have found this theory viable in asbestos cases. *See, e.g., Adcock v. Brakegate, Inc.*, 645 N.E.2d 888, 891 (Ill. 1994) (complaint alleging that asbestos manufacturer engaged in a conspiracy "to suppress information about the hazards of asbestos exposure and to assert positively claims that the conspirators knew were false" stated "a legally recognized cause of action"); *Fibreboard Corp. v. Hartford Acc. and Indem. Co.*, 20 Cal. Rptr. 376, 385 (Cal. Ct. App. 1993) (assuming viability of conspiracy theory in asbestos litigation, noting that "under a civil conspiracy action, Fibreboard could be legally liable for bodily injury even though its particular product was not incorporated in the plaintiff's building"); *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 147 (Del. 1987) (holding that "a cause of action exists against a

party whose asbestos products did not cause the purported injury, but who allegedly conspired with other manufacturers to actively suppress and intentionally misrepresent medical evidence warning of the health hazards of asbestos"). Both Georgia and Alabama recognize the tort of civil conspiracy. *See, e.g., Savannah College of Art & Design, Inc. v. School of Visual Arts of Savannah, Inc.*, 464 S.E.2d 895 (Ga. Ct. App. 1995); *Jones v. BP Oil Co., Inc.*, 632 So.2d 435, 439 (Ala. 1993) (stating elements of claim for civil conspiracy).

Although discovery in this case has barely begun, answers to interrogatories served by Georgia-Pacific in other cases indicate that the company and its predecessor sold asbestos-containing products since the mid-1950's. See Defendant, Georgia-Pacific Corporation's Responses to Master Interrogatories and Request for Production from Plaintiff in *In re: Asbestos Litigation*, In the District Courts of Cameron County, Texas, served November 29, 1995 (pertinent portions attached hereto) at 5-27 (listing products sold, dates of sale and asbestos content). The answers also indicate that Georgia-Pacific was a member of the Gypsum Association, which "did from time to time address issues relating to the use of asbestos." *Id.* at 40-41. Further discovery may well reveal that Georgia-Pacific's activities within this trade association, and its relationships with other manufacturers, will subject Georgia-Pacific to liability for civil conspiracy under the applicable substantive law. At a minimum, it cannot colorably be said that plaintiffs' have "no possibility" of recovering against Georgia-Pacific on their civil conspiracy theory.

IV. PROMPT DISPOSITION OF THIS MOTION IS REQUIRED.

Plaintiffs seek a ruling on this motion for remand on an expedited basis. At the same time that GM filed its notice of removal, it filed a Notice of Related Action with the Judicial Panel on Multidistrict Litigation identifying this case as a potential "tag-along" action to the nationwide asbestos multidistrict proceeding, and requesting that the case be transferred to the Eastern District of Pennsylvania and made a part of that proceeding. As plaintiffs demonstrated above, however, this case does not even belong in federal court. Plaintiffs should not be put to the time and expense of participating in the multidistrict proceeding when they are ultimately and absolutely entitled to pursue their claims in Georgia state court.

Under Rule 18 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, transfer of a "tag-along" case is not effective until the Panel overrules all objections to the transfer and the transfer notice is filed with the transferee court. Until that happens, this Court retains the power to enter any appropriate orders, including an order of remand. *Id.*; see also *Bartley v. Borden, Inc.*, 1996 WL 68482 (E.D. La. Feb. 13, 1996) (ordering remand of asbestos cases improvidently removed to federal court despite pendency of conditional transfer order). Unless this motion is decided promptly, however, plaintiffs risk a transfer that will serve absolutely no purpose other than to delay resolution of their claims needlessly. Plaintiffs therefore seek an immediate hearing on this motion.

V. THE COURT SHOULD ORDER GM TO REIMBURSE PLAINTIFFS FOR THE COSTS, FEES AND EXPENSES THAT THEY INCURRED AS A RESULT OF THE IMPROPER REMOVAL.

Inarguably, GM had no legal basis to remove this case to federal court. GM's contemporaneous filing with the Judicial Panel on Multidistrict Litigation makes clear that its sole purpose in removing this case to federal court was to delay, by many months, the prosecution and ultimate resolution of this case. In remanding a case, a court may require payment of "just costs and any actual expenses, including attorney's fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Under the circumstances presented here, the Court should exercise its discretion to require GM to pay the costs and actual expenses, including attorney's fees, incurred by plaintiffs as a result of the removal. Plaintiffs further ask the Court to include in its order of remand a provision for plaintiff to submit an itemization of those costs and expenses within ten days of the order.

VI. CONCLUSION

For the foregoing reasons, plaintiffs respectfully pray that the Court enter an order remanding this case to the Superior Court of Fulton County, State of Georgia, immediately. Plaintiffs additionally request that the order of remand require payment by defendants of just costs and

any actual expenses, including attorney's fees, incurred as a result of the removal.

Respectfully submitted,

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IN RE: ASBESTOS LITIGATION) IN THE DISTRICT
) COURTS OF CAMERON
) COUNTY, TEXAS

DEFENDANT, GEORGIA-PACIFIC CORPORATION'S RESPONSES TO MASTER INTERROGATORIES AND REQUEST FOR PRODUCTION FROM PLAINTIFF

(Filed Nov. 30, 1995)

COMES NOW, Georgia-Pacific Corporation (hereinafter referred to as "Georgia-Pacific"), a defendant in the above-styled action, by and through its attorneys of record and responds to Plaintiffs' as follows:

PRELIMINARY STATEMENT

Some of the events which may be relevant to the matters inquired into by these Interrogatories/Requests for Production of Documents/Requests for Admission occurred more than thirty-four (34) years ago. In addition, effective April 30, 1965, Georgia-Pacific Corporation (hereinafter referred to as either "Georgia-Pacific" or "Defendant") acquired by merger, all the assets and liabilities of the Bestwall Gypsum Company, which manufactured asbestos-containing products, and Georgia-Pacific continued the manufacture, sale and/or distribution of such products until the cessation of the same at various times

* * *

mined and whether you sold any asbestos to any Defendants in the Dallas County asbestos litigation.

ANSWER: No. Neither Georgia-Pacific nor its predecessors have ever mined or sold raw asbestos.

4. Identify by name each product containing asbestos fibers that Defendant or any of its predecessor or subsidiary companies at any time sold or manufactured.

ANSWER: Defendant manufactured the following products that contained a small amount of asbestos: All Purpose Joint Compound; Bedding Compound; Central Mix, Drywall Adhesive; Joint Compound; Kalite; Laminating Compound-Ready Mix; Lite Acoustic; Patching Plaster; Ready Mix; Spackling Compound; Speed Set, Texture; Topping Compound; and, Triple Duty Joint Compound. For products sold, see response to interrogatory 5.

5. Identify by name each product containing asbestos fibers that Defendant or any of its predecessor or subsidiary companies at any time marketed or sold.

ANSWER: Defendant sold the following which contained a small amount of asbestos: All Purpose Joint Compound; Bedding Compound; Central Mix; Drywall Adhesive; Joint Compound; Kalite; Laminating Compound-Ready Mix; Lite Acoustic; Patching Plaster; Ready Mix; Spackling Compound; Speed Set; Texture; Topping Compound; and, Triple Duty-Joint Compound.

From time to time, Georgia-Pacific Corporation, through its Distribution Division, sold a limited number of asbestos containing products that were manufactured by other companies. The product types were limited to conventional building products, and did not include commercial or industrial products such as industrial insulation products, fireproofing, asbestos cloth, or raw asbestos.

6. If the answer to one or more of the last three interrogatories is in the affirmative or lists any products, state as to each named product the following:

A. As to each product, state whether such product was mined, manufactured, marketed, and/or sold.

B. The names of the companies mining, manufacturing, marketing, and/or selling each product mined, manufactured, marketed, and/or sold.

C. The trade or brand name of each of those products mined, manufactured, marketed and/or sold.

D. The date each of the named products was placed on the market.

E. A description of the physical (chemical) composition of each of the named products, including the type of asbestos contained in the product and the percentage of asbestos put in each product.

F. The date each of the products was removed from the market and no longer sold or distributed and the reason or reasons therefor.

G. The date asbestos was REMOVED from such products, if ever, and the reasons therefor.

H. A description of the physical appearance of each of the named products.

I. A detailed description of the intended uses of the named products.

J. Identify the last year that you sold each asbestos-containing product.

ANSWER: All Purpose Joint Compound

A. Product was manufactured and sold by defendant.

B. Georgia-Pacific or its predecessors

C. All Purpose

D. Georgia-Pacific first placed All Purpose Joint Compound on the market for national distribution in 1967. Prior to that time, All Purpose may have been available for sale in limited areas.

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However, without waiving this objection, Georgia-Pacific states that All Purpose is a joint compound which contained 0 to 7% chrysotile asbestos.

F. Georgia-Pacific continues to sell asbestos-free All Purpose Joint Compound.

G. The first asbestos-free formula for All Purpose was in 1973. Asbestos was removed because an asbestos-free product was developed.

H. Dry

I. This product is used to finish walls and ceilings.

J. The last year asbestos-containing All Purpose was sold was approximately 1977.

Bedding Compound

A. Product was manufactured and sold by defendant.

B. Georgia-Pacific and its predecessor.

C. Bedding Compound.

D. The first year that Georgia-Pacific or its predecessor sold Bedding Compound was 1956.

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However, without waiving this objection, Georgia-Pacific states that Bedding Compound was a joint compound which contained 0 to 7% chrysotile asbestos.

F. Georgia-Pacific continues to sell asbestos-free Bedding Compound.

G. The first asbestos-free Bedding Compound was introduced in 1973. Asbestos was removed because an asbestos-free product was developed.

H. Dry.

I. This product is used to finish walls and ceilings

J. The last year asbestos-containing Bedding compound was sold was approximately 1977.

Central Mix

A. Product was manufactured and sold by defendant.

B. Georgia-Pacific

C. Central Mix

D. 1970

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However, without waiving this objection, Georgia-Pacific states that Central Mix was a joint compound which contained 3%-7% chrysotile asbestos.

F. Manufacture of Central Mix ended in 1973. The reason this product was discontinued is unknown.

G. Central Mix was discontinued in 1973. It was not replaced with an asbestos-free formula.

H. Dry

I. This product was used to finish walls and ceilings.

J. The last year Central Mix was sold was 1973.

Drywall Adhesive

A. Product was manufactured and sold by defendant.

B. Georgia-Pacific.

C. Drywall adhesive.

D. 1972.

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However, without waiving this objection, Georgia-Pacific states that Drywall Adhesive was a drywall adhesive which contained 0.8% chrysotile asbestos.

F. Manufacture of Drywall Adhesive ended in 1972. The reason this product was discontinued is unknown.

G. Drywall adhesive was discontinued in 1972. It was not replaced with an asbestos-free formula.

H. Dry.

I. Designed to adhere wallboard to wood studs.

J. 1972.

Joint Compound

A. Product was manufactured and sold by defendant.

B. Georgia-Pacific and its predecessor.

C. Joint Compound, Joint System.

D. The first year that Georgia-Pacific or its predecessor sold Joint Compound was 1956.

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However, without waiving this objection, Georgia-Pacific states that Joint Compound was a joint compound which contained 0 to 6% chrysotile asbestos.

F. Georgia-Pacific continues to sell asbestos-free Joint Compound.

G. Asbestos was removed from Joint Compound in 1974. An asbestos-free formula was introduced.

H. Dry.

I. Joint Compound is used to finish walls & ceilings.

J. The last year asbestos-containing Joint Compound was sold was approximately 1977.

Kalite

A. Manufactured and sold.

B. Predecessor of Georgia-Pacific.

C. Kalite.

D. 1956.

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However, without waiving this objection, Georgia-Pacific states that Kalite was an acoustical plaster which contained 0 to 2.6% chrysotile asbestos.

F. Kalite was removed from the market in 1959 due to poor sales.

G. Kalite was removed from the market. It was not manufactured without asbestos.

H. Dry.

I. Acoustical Plaster

J. The last year asbestos-containing Kalite was sold was 1959.

Laminating Compound – Ready Mix

A. This product was manufactured and sold by the defendant.

B. Georgia-Pacific.

C. Laminating Compound Ready Mix.

D. 1969.

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However,

without waiving this objection, Georgia-Pacific states that Laminating Compound-Ready Mix was a laminating compound which contained 0 to 4% chrysotile asbestos.

F. Laminating Compound Ready Mix was removed from the market in 1969.

G. Laminating Compound-Ready Mix was removed from the market in 1969. It was not manufactured without asbestos.

H. Paste.

I. Laminate wallboard.

J. The last year asbestos-containing Laminating Compound was sold was 1969.

Lite Acoustic

A. This product was manufactured and sold by the defendant.

B. Predecessor of Georgia-Pacific

C. Lite Acoustic

D. 1958

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However, without waiving this objection, Georgia-Pacific states that Lite Acoustic was an acoustical plaster which contained 25%-29.09% chrysotile asbestos.

F. Manufacture of Lite Acoustic ended in 1964 due to poor sales.

G. Asbestos containing Lite Acoustic was discontinued in 1964. It was not replaced with an asbestos-free formula.

H. Dry

I. Acoustical Plaster

J. The last year asbestos-containing Lite Acoustic was sold was 1964.

Patching Plaster

A. Manufactured and sold

B. Georgia-Pacific and its predecessor

C. Patching Plaster

D. 1956

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However, without waiving this objection, Georgia-Pacific states that Patching Plaster was a patching plaster which contained 0-2% chrysotile asbestos.

F. Georgia-Pacific continues to sell asbestos-free patching plaster.

G. Asbestos was removed from patching plaster in 1975. An asbestos-free formula was developed.

H. Dry.

I. Patching plaster is used to patch certain plasters.

J. The last year asbestos containing Patching Plaster was sold was approximately 1976.

Ready Mix

A. This product was manufactured and sold by defendant.

B. Georgia-Pacific and its predecessor.

C. Ready Mix.

D. 1963.

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However, without waiving this objection, Georgia-Pacific states that Ready Mix was a joint compound which contained 0 to 4.6% chrysotile asbestos.

F. Georgia-Pacific continues to sell asbestos-free Ready Mix.

G. Asbestos was removed from Ready Mix in 1975. An asbestos-free formula was developed.

H. Paste.

I. Ready Mix is used to finish walls or ceilings.

J. The last year asbestos containing Ready Mix was sold was 1977.

Spackling Compound

A. Manufactured and sold.

B. Georgia-Pacific and its predecessor.

C. Spackling Compound.

D. 1956.

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However,

without waiving this objection, Georgia-Pacific states that Spackling Compound was a joint compound which contained 5.5% chrysotile asbestos.

F. Spackling Compound was discontinued in 1970 or 1971 due to a lack or market response and poor sales.

G. Spackling Compound was discontinued in 1970 or 1971. No asbestos-free formula was introduced.

H. Dry.

I. Used to finish walls and ceilings.

J. The last year asbestos containing Spackling Compound was sold was 1970-1971.

Speed Set

A. Manufactured and sold.

B. Georgia-Pacific and its predecessor.

C. Speed Set.

D. 1963.

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However, without waiving this objection, Georgia-Pacific states that Speed Set was a joint compound which contained 0-6.75% chrysotile asbestos.

F. Georgia-Pacific continues to sell asbestos-free Speed Set.

G. Asbestos was removed from Speed Set in 1974. An asbestos-free formula was developed.

H. Dry.

I. Speed set is used to finish walls or ceilings.

J. The last year asbestos-containing Speed Set was sold was approximately 1974.

Texture

A. Manufactured and sold.

B. Georgia-Pacific and its predecessors.

C. Certex, Bestex, Texture.

D. 1956.

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However, without waiving this objection, Georgia-Pacific states that Texture was a texture which contained 0-15% chrysotile asbestos.

F. Georgia-Pacific continues to sell asbestos-free texture.

G. The first asbestos-free Texture was introduced in 1972. Asbestos was removed because an asbestos-free product was developed.

H. Dry.

I. Texture is used to give a textured appearance to walls or ceilings.

J. The last year asbestos-containing Texture was sold was approximately 1974.

Topping Compound

A. Manufactured and sold.

B. Georgia-Pacific and its predecessors.

C. Topping.

D. 1956.

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However, without waiving this objection, Georgia-Pacific states that Topping Compound was a joint compound which contained 0-7% chrysotile asbestos.

F. Georgia-Pacific continues to sell asbestos-free topping compound.

G. Asbestos was removed from Topping in 1973. An asbestos-free formula was developed.

H. Dry.

I. Topping Compound is used to finish walls or ceilings.

J. The last year asbestos-containing Topping Compound was sold was approximately 1977.

Triple Duty Joint Compound

A. Manufactured and sold.

B. Georgia-Pacific.

C. Triple Duty.

D. 1965.

E. Georgia-Pacific objects to this portion of plaintiff's interrogatory on the grounds that it seeks information which is a trade secret. However, without waiving this objection, Georgia-Pacific states that Triple Duty was a joint compound which contained 0-7% chrysotile asbestos.

F. Georgia-Pacific continues to sell asbestos-free Triple Duty.

G. Asbestos was removed from Triple Duty in 1974. An asbestos-free formula was developed.

H. Dry

I. Triple Duty Joint Compound is used to finish walls or ceilings

J. The last year asbestos-containing Triple Duty was sold was approximately 1977.

Georgia-Pacific does not have specific product information concerning the small number of products containing asbestos which it sold but did not manufacture.

7. Do any documents, including but not limited to written memoranda, specifications, recommendations, blueprints, or other written materials of any kind or character, relating to the design, preparation, or introduction into the market of the products listed in Interrogatory No. 6 still exist? If so, state:

A. A description of each such document;

B. The name, address, and job title of each person who currently has possession of each document, and where the documents are currently located.

ANSWER: Georgia-Pacific objects to this interrogatory on the grounds that it is over broad and unduly burdensome. Without waiving these objections, Georgia-Pacific states that documents concerning the development and introduction of the above-listed products exist and are in the custody of the Georgia-Pacific law department.

8. Before distributing, selling, or placing the products listed in your response to Interrogatory Nos. 3-6 into the streams of commerce, were any tests conducted to determine potential health hazards involved in the use of,

or exposure to, the materials such as asbestos, contained in those products? If the answer is affirmative, state:

A. The names of the products tested and the date of each test.

B. The name, address, and job title of each person conducting the tests or involved with conducting the tests.

C. The results of the tests.

* * *

ANSWER: Georgia-Pacific objects to this request to the extent that it is overly broad, ambiguous, irrelevant and not calculated to lead to the discovery of admissible evidence. Furthermore, Georgia-Pacific objects to this interrogatory to the extent that it does not specify the time period to which it refers. In addition, the interrogatory may assume a disputed fact that Georgia-Pacific products are hazardous. Subject thereto, Georgia-Pacific will make available any such documents, if any exist in Georgia-Pacific's records, at a time mutually agreed upon.

20. Has Defendant or any of its subsidiary or predecessor companies at any time been a member of any trade organization or association that published or disseminated any documents or information relating to the hazards of asbestos comprised of other manufacturers, miners, marketers, and/or sellers of asbestos products? If so, state:

A. The name and address of each such association or organization;

B. The dates during which Defendant or any of its subsidiaries or predecessors were members;

C. The names and dates of any publications, minutes, or reports published, written, or disseminated by any of the named associations or organizations.

D. Whether any of those publications are still in your possession, and if so:

1. A description of the publications, including the date;

2. The current location of such publications;

3. The custodian of such publications;

4. The method or manner in which such publications are maintained.

ANSWER: Georgia-Pacific was a member of the Gypsum Association, a trade organization which dealt primarily with issues relating to gypsum-based products. This organization did from time to time address issues relating to the use of asbestos. Minutes of meetings of some Gypsum Association meetings, found in Georgia-Pacific's files, are in the custody of the Georgia-Pacific law department.

* * *